152 U.S. 412

RECORD, CASE No. 14,069.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., ~~370~~. 128

JOHN HALSTEAD, APPELLANT,

vs.

A. G. GRINNAN ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

FILED JULY 2, 1890.

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1 Pleas held before the honorable judges of the circuit court of the United States for the district of West Virginia, at Charleston, on Monday, the 27th day of August, A. D. 1889, and in the 114th year of the Independence of the United States of America.

Be it remembered that heretofore, to wit:

Clerk's Office, District Court United States for the District of West Virginia, at Charleston, January 24th, 1885.

JOHN HALSTED
v.
A. G. GRINNER, FOREST HILL MINING & MANF. CO., Robert Soutter, Trustee; Wm. Wyants, and the Unknown Heirs of William K. Smith. } In Equity.

This day the plaintiff, John Halsted, by his counsel, A. Burlew, Esq., tenders his bill of complaint in the above cause, which is filed and process duly issued thereon, returnable to March rules next.

Teste: JASPER Y. MOORE, *Clerk.*

2 The said bill of complaint of John Halsted, referred to in the foregoing order, is in the words and figures following, to wit:

The bill of complaint of John Halsted, filed in the district court of the United States for the district of West Virginia against A. G. Grinnan, the unknown heirs of William K. Smith, The Forest Hill Mining & Manufacturing Company, Robert Soutter, trustee, and Wm. Wyants.

To the Honorable John J. Jackson, judge of the said court, sitting in equity:

Your orator, John Halsted, respectfully represents unto your honor that on the 27th day of October, 1860, George P. Huddleston executed & delivered to A. G. Grinnan a deed of conveyance for two hundred acres of land, "more or less," bordering on the south side of the Great Kanawha river, the lower corner on said river being nearly opposite the head of "Wheeler's island" and
3 extending back from said river for quantity, the said land being particularly described by metes & bounds & courses & distances, as will fully appear by a tested copy of said deed, herewith filed and made a part of this bill, marked "Ex. A." The said land lies in the county of Fayette and State of West Virginia. The aforesaid conveyance was made, as your orator is informed, in pursuance of a contract some time previously entered into between Grinnan or some one for him and the said George P. Huddleston.

That on the 15th day of June, 1859, W. K. Smith and wife, A. G. Grinnan, George B. Grinnan, & A. G. Grinnan, trustee, granted and

conveyed to the Forest Hill Mining & Manufacturing Company, a corporation doing business in the State of Virginia, two thousand acres of coal and timber lands lying in the said county of Fayette, just below Armstrong creek, known as the "Forest Hill tract," a tested copy of which deed is herewith filed and made a part of this bill, marked "Ex. B."

4 That by the said last-mentioned deed the grantors therein conveyed also to the said Forest Hill Mining & Manufacturing Company "a certain piece or parcel of a certain tract of land known as the 'Huddleston' tract, to be surveyed off the western side of said tract by a line running from the northerly to the southerly side of said tract, to be bounded on the south by the tract hereinbefore conveyed and on the north by the Great Kanawha river, and containing one hundred acres, more or less."

This last-mentioned tract is a part of and was intended to be one-half of the aforesaid two hundred acres conveyed by George P. Huddleston to A. G. Grinnan. The court will observe that the one hundred acre-, "more or less," calls for the northern boundary of the said Forest Hill tract, so that the two tracts shall come together and be coterminous at these points.

And this was the intention of *of* all parties to the said last-mentioned deed at the time it was executed—that is, that these

5 two tracts should join each other at the points mentioned, so as to give an outlet to the Great Kanawha river for this Forest Hill tract.

That on the 29th day of October, 1851, Wm. K. Smith and wife conveyed by deed to A. Grinnan the remaining half of said "Huddleston" tract, as will appear by the tested copy of deed, herewith filed and made a part of this bill, marked "Ex. C."

That on the 15th day of June, 1859, the said Forest Hill Mining and Manufacturing Company conveyed the said Forest Hill tract of two thousand acres and the said one-half of the said "Huddleston tract," to be surveyed off the western side of said tract as aforesaid, to Robert Souter, trustee, as will appear by a tested copy of the said deed of conveyance, herewith filed and made a part of this bill, marked "Ex. D."

That on the 6th day of June, 1864, the said Robert Souter, trustee, conveyed the same lands conveyed in the said last-mentioned

6 deed to John Halsted, the complainant in this bill, as will appear by a tested copy of the said deed of conveyance, herewith filed and made a part of this bill, marked "Ex. E."

Your orator says that the said Forest Hill Mining & Manufacturing Company took possession of said lands on its purchase as aforesaid, and the said company & its aforesaid grantees consecutively have had possession of the same to the present time.

Several years ago, your orator is informed, a division line was attempted to be run by some party, separating the one-half of the said Huddleston tract purchased as aforesaid by the Forest Hill Mining & Manufacturing Company from the other half of said tract, and until quite lately the said Forest Hill Company & its grantees were under the impression and believed that the said line

had been actually run and a division line made, but on investigation your orator has ascertained that the said survey was
7 never completed and that a division line was run but in part.

The said property was purchased as a co*le* property, but it has never been operated and has l*ied* idle since its purchase by the Forest Hill Co., in 1859, and therefore neither the said company nor its grantees have had any occasion to examine into the running of the said line or the laying off the one-half of the said Huddleston tract until a comparatively short time ago; nor have they had any occasion or necessity to have the one-half of the said Huddleston tract actually laid off and separated from the other part. Your orator is now advised and so avers that the said Grinnan cla-ms that the said division line separating the part purchased by the Forest Hill Mining & Manufacturing Co. from the remaining part of said Huddleston tract, so as to leave a narrow strip of land lying between the said 2,000 acres and the said frontage as a part of the part re-
8 tained by the said Grinnan, thus cutting off the said Forest Hill tract from communication with the Great Kanawha river, to avoid which the said one-half was purchased. As soon as this discovery & claim were made he immediately made the matter known to the said Grinnan, but said Grinnan has not seen fit to correct this false and unjust claim and has taken no steps to have the said Huddleston tract laid off and divided according to his deed and covenants. Your orator now desires to have the one-half of the said Huddleston tract by your orator partitioned and laid off in accordance with the deeds hereinbefore referred to and according to your orator's just and equitable rights in the matter. Your orator say- that whatever claims William Wyants has, if any, to the said one-half of the Huddleston tract purchase- by your orator as aforesaid have been obtained and possessed by him with full knowledge of your orator's rights and claims in the matter, and is in no sense an innocent party in this controversy; and your orator prays
9 that he may be compelled to disclose his title or claim and show what his defence is.

The said division line was not run at the instance of the said Co. or its grantees, nor were they present when the said line was run, but said line, so far as it was run, was at the instance of the said Grinnan. Your orator believes and avers that, as a matter of fact, the said division was only partly run by said surveyor.

Your orator avers and charges also that the said division line was run in part so as to separate the front from the back land of said company, and in violation of the requirements of the said deed from the said Smith & Grinnan to the said company by accident or mistake or by fraud & deceit of the said Grinnan.

Your orator is informed that William Wyants is now claiming some interest in the upper half of the said "Huddleston"
10 tract—that is, the one-half retained by said Smith & Grinnan as aforesaid—but your orator does not know the extent or character of the said claim.

Your orator is informed that the said William K. Smith is dead, & your orator does not know whether his widow is living or not, nor who or where his heirs are, but your orator is informed that said Smith parted with his entire interest in all of said property to said Grinnan.

Your orator is advised that the laying off of the said one-half of the said Huddleston tract purchased from the said Smith & Grinnan so as to conform to the requirements of *of* their deed is a proper subject for equitable relief.

Your orator is in the position of a joint owner of an undivided interest in land which has never been laid off to him by a court nor the division line agreed upon by your orator or by either
11 of his grantors, and your orator is advised that the laying off of this land according to said deed is a matter which addresses itself to a court of equity, and this relief cannot with certainty be had by a common-law court. Your orator says that his remedy at law is uncertain and incomplete and a resort to that tribunal for redress would be vexacious and troublesome and involve a multiplicity of suits, which it is the province of a court of equity to avoid.

Your orator therefore prays that A. G. Grinnan, The Forest Hill Mining & Manufacturing Company, Robert Soutter, trustee; William Wyants, and the unknown heirs of William K. Smith, dec'd, be made parties defendants to this bill and be required to answer the same fully and explicitly, and that for this purpose process be issued against them; that the said one-half of the said "Huddleston" tract be run out and laid off to your orator in con-
12 formity with the said deed from William K. Smith and A. Grinnan to the said Forest Hill Mining & Manufacturing Company, dated the 15th day of June, 1859, so as to connect the said one half with the said "Forest Hill" tract of $2,000 acres, and that your orator be quieted in his title.

NOTE.—The words "and that your orator be quieted in his title" are written in pencil in original bill.—L. B. Dellicker, clerk.

Your orator says he is a citizen of the *of the* State of Pennsylvania and the defendants are citizens of other States; that the controversy is between citizens of different States, and the matter in dispute exceeds the value of five hundred dollars, exclusive of costs.

And your orator prays general relief.

JOHN HALSTED,
By A. BURLEW, *Sol.*

A. Burlew, the agent and attorney for John Halsted, whose name is signed to the foregoing bill, after being by the undersigned duly sworn, says that the facts and allegations contained in the
13 foregoing bill he believes to be true.

JASPER Y. MOORE,
Cl'k D. C. U. S., D. W. Va.

14 EXHIBIT A referred to in foregoing bill is in the words and figures following, to wit:

George P. Huddleston
to
Andrew G. Grinnan. } Deed.

This deed made this 27th day of October 1860 between George P. Huddleston and Nancy M. his wife of Fayette county Virginia of the one part and Andrew G. Grinnan in his own right and as trustee of William K. Smith of the other part witnesseth that in consideration of the sum of twenty-four hundred and seventy-six dollars paid at different times to the party of the first part by said Smith and by said Grinnan as his trustee the receipt of which is hereby fully acknowledged the said parties of the first part do grant and convey with general warranty unto the party of the second part the following tract of land lying and being in the county of Fayette State of Virginia on the Great Kanawha below the mouth of
15 Armstrong creek; containing two hundred acres (200 acres) be the same more or less bounded as follows. Beginning at a sycamore opposite the head of Wheeler's island and running 55¼° W. 460 poles to two pines on a ridge corner to Paxton, thence S. 33 E. 38 poles to a poplar on a dividing ridge corner to Buster's heirs' land, thence with the top of the said ridge & Buster's lines N. 38 E. 40 poles N. 15 E. 10 poles N. 68 E. 32 poles N. 35 E. 28 poles N. 73 E. 14 poles S. 82 E. 88 poles S. 60 E. 23 poles N. 70 E. 30 poles N. 13 E. 30 poles N. 50 E. 16 poles N. 30 E. 28 poles S. 85 E. 52 poles S. 50 E. 80 poles N. 9 E. 115 poles N. 28 W. 85 poles to a lynn corner thence No. 10 E. 11 poles to a beech on Kanawha river thence down said river N. 35 W. 36 poles to the beginning. And the said George P. Huddleston and Nancy M. his wife do covenant and agree that they will warrant generally the property hereby conveyed.

Witness the following signatures and seals.

G. P. HUDDLESTON. [SEAL.]
NANCY M. HUDDLESTON. [SEAL.]

16 FAYETTE COUNTY, VA., *To wit:*

This day personally appeared before me Henry Rigg & J. C. Huddleston, *a* justices of said county, do hereby certify that G. P. Huddleston and Nancy M. Huddleston, his wife, parties to the foregoing deed, this day personally appeared before us, in our said county, & acknowledged the same to — their act & deed; and the said Nancy M. Huddleston, being examined prively and apart from her said husband and having the said deed fully explained to her, declared she had willingly signed, *sigind*, sealed, and delivered the same and did not wish to retract it.

Given under our hands this 27 day of October, 1860.

HENRY RIGG, *J. P.*
J. C. HUDDLESTON, *J. P.*

FAYETTE COUNTY COURT,
CLERK'S OFFICE, *October 2nd*, 1860.

The foregoing deed, with the certificate of acknowledg-
17 ment thereto, annexed was presented in said office and admitted to record.

Teste: J. B. JONES, *Clerk*.

FAYETTE COUNTY COURT,
CLERK'S OFFICE, *January 26th*, 1885.

I, E. B. Hawkins, clerk of Fayette county court, do hereby certify that the foregoing is a true copy as taken from the records of this office.

Teste: E. B. HAWKINS,
Clerk Co. C't.

18 EXHIBIT B referred to in foregoing bill is in the words and figures following, to wit:

Smith & Grinnan
to
Forest Hill Co.

This indenture made the fifteenth day of June in the year of our Lord one thousand eight hundred and fifty-nine, between William K. Smith and Abigail H. his wife and Andrew Glassel Grinnan and Georgia B. his wife all of Fredericksburg in the State of Virginia and the said Andrew Glassel Grinnan trustee, (under and by virtue of a deed from said William K. Smith to him, dated October 29, 1857 and articles of agreement between said Smith and said Grinnan made the 10th day of February, A. D. 1859, referring to said deed as by reference to said deed and agreement both duly recorded in Fayette county, Virginia, will more fully and at large appear) parties of the first part, and the Forest Hill Mining and Manufacturing Company, a corporation charte-d by the legislature of the State of Vir-
19 ginia of the second part, witnesseth that the said parties of the first part for and in consideration of the sum of one dollar lawful money of the United States of America, and for other good and valuable considerations unto them well and truly paid by the said party of the second part at and before the sealing and delivery of these presents the receipt whereof is hereby acknowledged have granted, bargained, sold, aliened, enfeoffed released and confirmed, and by these presents do grant, bargain, sell, alien, enfeoff, release and confirm unto the said party of the second part, their successors and assigns, all that certain tract piece or parcel of land situate lying and being in the county of Fayette and State of Virginia, bounded and described as follows to wit: Beginning at a point marked "A" in the middle of the northern line of the old Forest Hill tract, thence N. 23 W. 193 perches to two chestnut oaks on a ridge between Armstrong and Morris creeks, and corner to the lands of the Paint

Creek Company, thence along the top of said ridge S. 87° W. 40
20 poles to two chestnuts, S. 59° W. 42 poles to a tall white oak, S.
32° W. 54 poles to a chestnut, south 12° west 61 poles to a black oak S. 60° W. 32 poles to a white oak S. 26° W. 34 poles to two chestnut oaks, S. 48 W. 23½ poles to a chestnut, S. 64 W. 53 poles to a dogwood, S. 11 W. 26 poles to a white oak, S. 51 W. 106 poles to a gum, S. 10° W. 18 poles to a chestnut, S. 44 W. 21½ poles to a stake, S. 75 W. 45 poles to a hickory S. 45 W. 26 poles to a small locust S. 15 W. 24 poles to a chestnut oak S. 42 poles to a chestnut oak S. 28° E. 90 poles to a black oak, S. 84 W. 18 poles to a stake, S. 60° W. 41 poles to a chestnut, S. 65 W. 44 poles to a black oak, N. 83 W. 36 poles to a chestnut, S. 43 W. 82 poles, N. 87° W. 28 perches to three chestnuts N. 82 W. 60 poles to a black oak S. 50 W. 20 poles to a white oak, S. 12 W. 20 poles to a stake, S. 5 W. 41 poles to a white oak, N. 86 W. 32½ poles to a chestnut, S. 35 west 59 poles to a chestnut oak at the head of Morris creek. Thence along the ridge between Paint and Armstrong creeks, S. 30° W. 69 poles to a chestnut, S. 55° E. 24 poles to a chestnut oak, N. 80 E. 25 poles to
two chestnut oaks, S. 65° E. 25 poles to a pine, N. 80 E. 56
21 poles to a white oak S. 16 E. 102 poles to a chestnut oak, S.
20 W. 48 poles to a chestnut, S. 45 W. 80 poles to a chestnut, S. 33 E. 32 poles to a chestnut oak S. 20 W. 77 perches to a chestnut oak and pine, S. 16 E. 50 poles to a chestnut S. 5 W. 47 poles to a chestnut oak at the head of Ash Camp branch, S. 50 E. 66 poles to a chestnut oak, N. 67 E. 24 poles to a chestnut, S. 87 E. 34 poles to a chestnut S. 67 E. 24 poles to a chestnut S. 2 W. 34½ poles to a chestnut oak, S. 14 W. 44 poles, S. 23 E. 41 poles to a chestnut, north 84 E. 185 poles thence N. 6 W. 450 poles thence N. 31 E. 900 poles to the beginning. Containing two thousand acres more or less and being the same tract of land which William Henry Edwards, and Catharine C. his wife, by their several deeds dated respectively, conveyed to the said William K. Smith and Andrew G. Grinnan in fee simple as in and by said indenture recorded in Fayette county aforesaid, relation being thereto had will more fully and at large appear. Also a certain piece or parcel of a certain tract of land known as the Huddleston tract to
be surveyed off the western side of said tract by a
22 line running from the northerly to the southerly side of
said tract to be bounded on the south by the tract hereinabove conveyed, and on the north by the Great Kanawha river, and containing one hundred acres more or less. Also the perpetual right of way to the said party of the second part, their successors & assigns through a tract of land known as the "Elk Ridge" tract, lying between the tract of 2,000 acres, hereinabove conveyed and Armstrong's creek, with the privilege of the said party of the second part of entering thereupon by their agents and servants and constructing upon and over the same such roads or railroads, as they may deem necessary for convenient access to and from the lands hereby conveyed. Together with all and singular the improv-ments ways, waters, water-courses, rights liberties privi-

leges hereditaments dower and right of dower and appurtenances whatsoever, thereunto belonging or in anywise appertaining, and the reversions and remainders, rents, issues, and profits
23 thereof; and all the estate right, title, interest, property claim and demand whatsoever of the said parties of the first part, in law, equity or otherwise howsoever, of, in, and to the same and every part thereof. To have and to hold said premises hereby granted or mentioned and intended so to be with the appurtenances, into the said party of the second part its successors and assigns to and for the only proper use and behoof of the said party of the second part its successors and assigns forever. And the said William K. Smith and Andrew G. Grinnan severally but not jointly, and each for himself his heirs executors and administrators do by these presents, covenant, grant & agree to and with the said party of the second part its successors and assigns that they the said William K. Smith and Andrew G. Grinnan and their heirs all and singular the hereditaments and premises hereby granted or mentioned or intended so to be with the appurtenances unto the said party of the second part its successors and assigns against them the said William K. Smith and Andrew
24 G. Grinnan and their heirs and against all and every — or persons whatsoever, lawfully claiming or to claim the same, shall and will severally and each for himself as aforesaid warrant and forever defend. And the said William K. Smith and Andrew G. Grinnan severally and not jointly and each for himself his heirs executors and administrators do covenant and agree to and with the said party of the second part, their successors and assigns, that the said William K. Smith and Andrew G. Grinnan at the time of the sealing and delivery of these presents, are lawfully seized of a good, absolute and indefeasible estate of inheritance in fee simple of and in all and singular, the above granted bargained and described premises, with the appurtenances, and have a good right, full power and lawful authority to grant bargain, sell and convey the same in manner and form aforesaid. And that the said party of the second part its successors and assigns, shall and may at all times hereafter, peaceably and equitably, have, hold,
25 use occupy and enjoy the above-granted premises, and every part and parcel thereof with the appurtenances, without any let, suit, trouble, molestation, eviction or disturbance of the said parties of the first part, their heirs or assigns or any other person or persons lawfully claiming or to claim the same; and that the same now are free clear discharged and unincumbered of and from all former and other grants, titles, charges, estates, judgments taxes assessments and encumbrances of what nature or kind soever. And also that the said party of the first part and their heirs, and all and every other person or persons, whatsoever lawfully and equitably deriving any estate, right, title or interest of in or to the hereinbefore-granted premises, by, from, under or in trust for them shall and at any time or times hereafter upon the reasona-l- request and at the proper cost and charges in the law of the said party of the second part, its suc-

cessors and assigns, make do and execute or cause or procure to be made done or executed all and every such further and other
26 lawful and reasonable acts, conveyances and appurtenances in the law, for the better and more effectual vesting and confirming the premises hereby intended to be granted in and to the said party of the second part, its successors and assigns forever, as by the said party of the second part its successors and assigns, or its counsel, learned in the law, shall be reasonably devised advised, or required. And the said Andrew G. Grinnan, trustee as aforesaid, doth covenant grant and agree, to and with the said party of the second part *of the second part* its successors and assigns that since the creation of said trust, he has not done or caused or suffered to be done anything whereby any lien or encumberance of any nature or kind whatsoever has been created upon the premises hereinbefore conveyed and mentioned in said trust.

In witness whereof the said parties of the first part have
27 hereunto set their hands and seals the day and year first above mentioned.

W. K. SMITH. [SEAL.]
A. H. SMITH. [SEAL.]
A. G. GRINNAN. [SEAL.]
GEORGIA B. GRINNAN. [SEAL.]
A. G. GRINNAN (*Trustee*). [SEAL.]

Sealed and delivered in presence of *us.*
J. M. McKINNEY.

The words "their successors & assigns" interlined in the 10th line from the top on the third page before signing; also the word "anything," above.

J. M. McKINNEY.

STATE OF NEW YORK, } *To wit:*
City & County of New York, }

I, John M. McKinney, a commissioner appointed by the governor of the State of Virginia for the said State of New York, certify that William K Smith and Abigail H., his wife, and Andrew G. Grinnan and Georgia B., his wife, and the said Andrew G. Grinnan, trustee, whose names are signed to the writing above, bearing date on the 15th day of June, A. D. 1859, have acknowledged the same before me, in the city and State of New York aforesaid; and I do further certify that Abigail H. Smith, wife of the said Wil-
28 liam K. Smith, and Georgia B. Grinnan, wife of the said Andrew G. Grinnan, whose names are signed to the above writing as aforesaid, personally appeared before me, in the city, county, and State aforesaid, and being respectively by me examined privily and apart from their said husbands and having the writing aforesaid fully explained to them, they, the said Abigail H. and Georgia B., severally acknowledged the said writing to be their act

and declared that they had willingly executed the same and do not wish to retract it.

Given under my hand and official seal, at my office, [SEAL.] in the city of New York, this 15th day of June, A. D. 1859.

JOHN M. McKINNEY,
Commissioner of Virginia.

VIRGINIA:

FAYETTE COUNTY COURT,
CLERK'S OFFICE, *July 7th*, 1859.

The foregoing deed, with certificate of acknowledgment thereto annexed, was presented in said office and is admitted to record.

Teste: J. B. JONES, *Clk.*

29 STATE OF WEST VIRGINIA:

FAYETTE COUNTY COURT,
CLERK'S OFFICE, *March 18th*, 1872.

I, G. M. Blume, clerk of the county court of Fayette county, do certify that the above indenture & certificates thereto annexed is a true copy from the record in this office, Deed Book "E," pages 295, 296, 297.

Teste: G. M. BLUME, *Clerk.*

30 EXHIBIT C referred to in foregoing bill is in the words and figures following, to wit:

This indenture made this twenty-ninth day of October in the year eighteen hundred and fifty-seven, between Wm. King Smith of Fredericksburg Virginia of the one part and A. G. Grinnan of the the other part, witnesseth, that for the sum of one dollar and further valuable consideration, the party of the first part does grant and convey with general warranty unto the party of the second part, the following property, to wit, the real estate of said Smith in the county of Fayette, Virginia, including a tract of forty thousand acres, more or less conveyed to said Smith by Wm. H. Edwards on December 2nd 1852, also the interest of said Smith in a tract of seven thousand acres more or less, on the west side of Armstrong's creek, conveyed to said Smith by said Edwards on the 1st of August 1853, also the remaining half of a tract of about two hundred acres
31 lying on the Kanawha below Armstrong's creek being the tract contracted to be conveyed — said Edwards for said Smith's benefit, by Geo. Huddleston. Also a tract of about fifteen acres patented to L. H. Brannan on the 11th of November 1834, and conveyed to said Smith by said Edwards on the 7th of October 1857.

Witness the following signatures and seals.

WM. K. SMITH. [SEAL.]
—— ——. [SEAL.]

STATE OF VIRGINIA, *City of Richmond,* } *To wit:*

I, James Pleasants, a notary public for the said city, in the State of Virginia, do certify that W. K. Smith, whose name is signed to the writing above, bearing date on the 29th day of October, 1857, has acknowledged the same before me in my said corporation.

Given under my hand this 29th Oct., 1857.

JAMES PLEASANTS, *Not. Pub.*

FAYETTE COUNTY COURT,
CLERK'S OFFICE, *November 14th,* 1857.

32 The foregoing deed, with the certificate of acknowledgment thereto annexed, was presented in said office and is admitted to record.

Teste: J. B. JONES, *Clk.*

A copy.
Teste: M. T. DAVIS,
Clerk County Court, Fayette County, West Virginia.

33 EXHIBIT D referred to in foregoing bill is in the words and figures following, to wit:

This indenture made the fifteenth day of June in the year of our Lord one thousand eight hundred and fifty-nine, between the Forest Hill Mining and Manufacturing Company, a corporation chartered by the legislature of the State of Virginia, of the first part and Robert Soutter of the city and State of New York of the other part, trustees for the purposes hereinafter mentioned,

Witnesseth that the said party of the first part for and in consideration of the sum of one dollar to them in hand paid by the said party of the second part the receipt whereof is hereby acknowledged hath granted bargained, sold aliened remised released and confirmed and by these presents doth grant bargain sell alien, remise
34 release and confirm unto the said party of the second part, all that certain tract of land situate in Fayette county in the State of Virginia and now known as the "Forest Hill tract," containing two thousand acres, more or less. Also a lot piece or parcel of land containing one hundred acres to be surveyed off the west side of the tract of land known as the Huddleston tract, adjoining the above, also the right of way through and across the Elk Ridge tract, also adjoining the above, which said lands and right of way are more fully described in a deed from William K. Smith and wife and Andrew G. Grinnan and wife, and the said Andrew G. Grinnan, trustee, to the aforesaid Forest Hill Mining and Manufacturing Company bearing date herewith to be recorded in Fayette county aforesaid and to which deed for a more full description of said tracts of land and rights of way reference is hereby made. Together with all and singular the improvements, tenements hereditaments and appurtenances thereunto belonging or in anywise apper-

taining: In trust nevertheless to secure the payment of
35 the sums of money mentioned in the following obligations according to the tenor and effect of said obligations, to wit, first, sixteen promissory notes, two of Charles F. Hale, two of David G. Barnitz, two of Lewis A. Rosenmiller, two of Henry H. Eames, two of John McClelland, two of John Osborne, two of Putnam Brinley, and two of John F. Cowan, bearing even date herewith for the sum of 510 and 515 dollars respectively payable four and six months after date to the order of the drawer and endorsed by him, and eighty bonds of the said Forrest Hill Mining and Manufacturing Company bearing even date herewith each for the sum of five hundred dollars with interest at the rate of six per cent. per annum with coupons thereto attached, for the payment of said interest semi-annually on the first day of December and June on and after the first day of December, A. D. 1859, at the banking house of Duncan Sherman & Company in the city of New York, twenty bonds
36 payable on the 1st day of June A. D. 1862 twenty-six thereof payable on the first day of June, A. D. 1864, and the remaining twenty-six payable on the first day of June, A. D. 1867. It being understood and agreed that if default be made in the payment of either principal or interest of said notes or bonds when due the said Robert Soutter as trustee when required so to do by the holder or holders of said notes or bonds, after giving public notice of the time and place of sale by publication in a daily newspaper published in the city of New York, for thirty days next preceding each day of sale, shall expose the property hereinbefore conveyed to public sale at the Merchants' Exchange in the city of New York and sell the same to the highest bidder for cash and shall distribute the proceeds of such sale in the manner following to wit,—

First to the payment of the promissory notes above recited, the twenty-eight bonds due in 1862, and the twenty-six bonds
37 due 1864, or such portion thereof as may remain unpaid) *pro rata*, and after they shall be fully paid and satisfied then second, to the payment of the twenty-six bonds falling due in 1867, the surplus of the proceeds of said sale after the payment of said notes & bonds in full if any there be, to be paid to the said parties of the first part, their successors and assigns, and it is further understood and agreed, that upon the payment of said notes and bonds by the said party of the first part, this indenture shall be null and void.

In witness whereof the said Forrest Hill Mining and Manufacturing Company party of the first part has caused this *obl*denture to be signed by its secretary and president and its corporate seal to be hereunto affixed this fifteenth day of June, A. D. one thousand eight hundred and fifty-nine.

CHAS. F. HALE, *President.*

[SEAL.] DAVID G. BARNITZ, *Secretary.*

Witness presents:
J. M. McKINNEY.

STATE OF NEW YORK, } *To wit:*
City & County of New York, }

38 I, John M. McKinney, a commissioner appointed by the governor of the State of Virginia for the said State of New York, certify that Charles F. Hale & David G. Barnitz, whose names are signed to the writing above, bearing date on the 15th day of June, A. D. 1859, as president & secretary of the Forrest Hill Mining and Manufacturing Company, have acknowledged the same before me, in the city and State of New York aforesaid.

Given under my hand & official seal this 15th day of June, A. D. 1859 (June 15th, 1859).

[SEAL.] JOHN M. McKINNEY,
Commissioner for Virginia.

VIRGINIA:

FAYETTE COUNTY COURT,
CLERK'S OFFICE, *June 27th*, 1859.

The foregoing deed in trust was received for record and, with the certificate of acknowledgement thereto annexed, is admitted thereto.

Teste: J. B. JONES, *Cl'k.*

WEST VIRGINIA:

FAYETTE COUNTY RECORDER'S OFFICE, *November 23d*, 1868.

The foregoing trust deed, together with the certificates thereto annexed, is a true copy from the record.

Teste: G. M. BLUME, *Recorder.*

39 EXHIBIT E referred to in foregoing bill is in the words and figures following, to wit:

This indenture made the sixth day of June in the year one thousand eight hundred and sixty-four between Robert Soutter trustee of the city county and State of New York party of the first part, and John Halstead of the same city county and State party of the second part, whereas the Forrest Hill Mining and Manufacturing Company, a corporation chartered by the legislature of the State of Virginia on or about the fifteenth day of June in the year one thousand eight hundred and fifty-nine executed under its corporate seal and delivered to the party of the first part a certain deed bearing date the day last aforesaid whereby the said corporation conveyed to said party of the first part certain lands and tenements in the said State of Virginia and described in said deed as follows, to wit:

40 all that certain tract of land situated in Fayette county Virginia and now known as the Forrest Hill tract containing two thousand acres more or less, also a lot piece or parcel of land containing one hundred acres to be surveyed off the west side of the tract of land known as the Huddleston tract adjoining the above, also the right of way through and across the Elk Ridge tract, also adjoining the above which said lands and right of way are more fully described in a deed from William K. Smith and wife and Andrew G. Grinnan and wife and the said Andrew G. Grinnan trustee

to the aforesaid Forrest Hill Mining and Manufacturing Company bearing date the 15th day of June 1859, together with all and singular the improvements tenements hereditaments and appurtenances thereunto belonging or in anywise appertaining, in trust nevertheless to secure the payment of the sums of money mentioned in sixteen promissory notes and eighty certain bonds according to the tenor and effects of said
41 notes and bonds and which said notes and bonds are in said deed particularly described, and whereas the said deed contains after the description of the premises aforesaid the following recital to wit; it being understood that if default be made in the payment of either principal or interest of said notes and bonds (referring to the notes and bonds aforesaid) the said Robert Soutter as trustee when required so to do by the holder or holders of said notes or bonds, after giving public notice of the time and place of sale by publication in a daily newspaper published in the city of New York for thirty days next preceding such day of sale "shall expose the property hereinbefore conveyed" (referring to and meaning the premises described in said deed as hereinbefore stated) to public sale at the Merchants' Exchange in the city of New York and sell the same to the highest bidder for cash. And whereas default has been made in the payment of two of the notes mentioned in said deed to wit, the two therein men-
42 tioned of Charles F. Hale, and the same have not been paid and also in the payment of interest on all the bands in said deed mentioned and in the payment of the principle of all the said bonds which have become due and payable. Neither all the interest upon nor the principle of the said bonds or either or any of them having been paid. And whereas the said party of the first part was more than thirty days before the sale hereinafter mentioned, required by John Halsted hereinbefore named, the holder of the two notes last above mentioned and of fifty-one of said bonds, of which said fifty-one twenty-seven became due and payable on the first day of June in the year one thousand eight hundred and sixty-two to expose the property hereinbefore described to public sale and to sell the same in pursuance of and in accordance with the trust contained in said deed. And whereas the said party of the first part did in conformity with such requirement and in pursuance of and in accordance with the trusts contained in said deed and in pursuance of and in obe-
43 dience to the directions contained in a judgment bearing date the second day of March one thousand eight hundred and sixty-four rendered in the supreme court of the State of New York in an action in that court wherein the said John Halstead is plaintiff and the said Robert Soutter and the said, The Forrest Hill Mining and Manufacturing Company are defendants, and after giving public notice of the time and place of sale by publication in a daily newspaper published in the city of New York, namely the New York Evening Post for thirty days next preceding the day of sale expose- to public sale and did sell at the Merchants' Exchange in the city of New York on the sixth day of May in the year one

thousand eight hundred and sixty-four under the direction of Murry Hoffman, Esquire, the referee in such judgment, the premises hereinafter described to the said party of the second part who was the highest bidder at such sale, for the sum of thirty-five hundred dollars:

44 Now therefore this indenture witnesseth that said party of the first part in consideration of the premises and of the sum of thirty-five hundred dollars to him in hand paid the receipt whereof is hereby acknowledged hath granted, bargained, sold, aliened, remised, released, conveyed, and confirmed and doth hereby grant, bargain, sell, alien, remise, release, convey, and confirm unto the said part- of the second part, his heirs and assigns, all that certain tract of land situate in Fayette county, West Virginia, and known as the Forrest Hill tract, containing two thousand acres, more or less; also a lot, piece, or parcel of land (containing one hundred acres, more or less, provided in said deed to be surveyed off the west side of the tract of land known as the Huddleston tract, as the same was ascertained and bounded by the survey made subsequently to the execution of the said deed and in pursuance thereof) adjoining the above; also the right of way through and across the Elk Ridge tract, also adjoining the above, which said lands and right of way are more fully described in a deed from William K. Smith and wife and Andrew G. Grinnan and

45 wife and the said Andrew G. Grinnan, trustee, to the aforesaid Forrest Hill Mining and Manufacturing Company, bearing the same date as the deed or conveyance in trust first above mentioned, together with all and singular the improvements, tenements, and hereditaments and appurtenances thereunto belonging or in anywise appertaining and all the right, title, and interest which the said party of the first part as the trustee named in said deed ever had or has in the lands and tenements last described.

To have and to hold the same unto the said party of the second part, his heirs and assigns forever.

In witness whereof I have hereunto set my hand and seal the day and year first above written.

ROBERT SOUTTER, *Trustee.* [SEAL.]

In the presence of—the word on the 10th line from the top on the third page first erased, and the word all on the same page interlined in the fourteenth line—

MURRY HOFFMAN.
CHARLES NETTLETON.

46 STATE OF NEW YORK, } ss:
City and County of New York, }

I, Charles Nettleton, a commissioner appointed by the governor of West Virginia for the State of New York, do certify that Robert Soutter, trustee, whose name is signed to the writing above, bearing

date on the sixth day of June, A. D. 1864, has acknowledged the same before me, in my State aforesaid.

Given under my hand and official seal this 24th day of June, A. D. 1864.

CHARLES NETTLETON,
Commissioner for West Virginia in New York.

STATE OF NEW YORK, }
City and County of New York, } *ss, To wit:*

I, Charles Nettleton, a notary public for the county aforesaid, in the State of New York, do certify that Robert Soutter, whose name is signed to the writing above, bearing date on the sixth day of June, A D. 1864, has acknowledged the same before me, in my county aforesaid.

Given under my hand and notarial seal this 24 day of June, A. D. 1864.

[SEAL.] CHARLES NETTLETON,
Notary Public in & for the City, County, & State of New York.

47 STATE OF WEST VIRGINIA:

COUNTY OF FAYETTE,
RECORDER'S OFFICE, *January 29th*, 1866.

The foregoing deed being duly stamped according to law, with the certificate of acknowledgment thereto annexed, was presented in said office and admitted to record.

Teste: G. M. BLUME, *Recorder.*

A true copy from Deed Book "E," pages 618, 619, and 620.

Teste: G. M. BLUME, *Recorder.*

STATE OF WEST VIRGINIA:

FAYETTE COUNTY COURT,
CLERK'S OFFICE, *August 31st*, 1874.

The foregoing deed & certificates thereto annexed is a true copy from the records in this office.

In testimony whereof I have hereunto set my hand & affixed the seal of the county court, in my said office.

[SEAL.] G. M. BLUME, *Clerk.*

48 The subpœna issued upon the filing of the foregoing bill is in the words and figures following, to wit:

The President of the United States of America to A. G. Grinner, Forest Hill Mining and Manufacturing Company, Robert Soutter, trustee; William Wyants, and the unknown heirs of William K. Smith:

We command you that on the first Monday in March next, at rules to be held in the clerk's office of the district court of the United States for the district of West Virginia, at Charleston, laying all other matters and excuses aside, you do cause an appear-

ance to be entered for you in the said court to a bill in chancery filed against you by John Halsted, citizen and inhabitant of the State of Pennsylvania, and that you do answer concerning such things as shall then and there be alleged against you and observe what the said court shall direct in this behalf, upon pain of an attachment issuing against your person and such other process
49 of contempt as the said court shall award.

Witness the Hon. John J. Jackson, judge of the said court, at Charleston, this 24th day of January, A. D. 1885, and in
[L. S.] the 109th year of the Independence of the United States of America.

Teste: JASPER Y. MOORE,
Clerk District Court U. S., District W. Va.

☞MEMORANDUM.—The defendants are to enter their appearance in the suit mentioned in the foregoing writ, in the clerk's office therein mentioned, on or before the day on which the said writ is returnable; otherwise the bill will be taken *pro confesso*.

Teste: JASPER Y. MOORE,
Clerk D. C. U. S., Dist. W. Va.

50 (Endorsed.)

Service of the within accepted.
FOREST HILL MINING & MANUFACTURING COMPANY &
ROBERT SOUTER, *Trustee*,
By A. BERLEW, *Att'y.*

Feb. 19, 1885.

Executed the within spa. in ch'y on Wm. Wyant by delivering an office copy of the same to him on the 23*th* day of Feb., 1885, the other parties named not being found in my district.

GEO. W. ATKINSON,
U. S. Marshal,
By JAS. S. ATKINSON, *Deputy.*

51 And at another day, to wit:

In the District Court of the United States for the District of West Virginia, at Charleston, on the 16th Day of March, A. D. 1885, in Vacation.

JOHN HALSTED
vs.
A. G. GRINNAN & Others. } In Chancery.

It appearing to the satisfaction of the court that the defendants, A. G. Grinnan and the unknown heirs-at-law of Wm. K. Smith, are not residents of nor found within the district of West Virginia, nor that they or any of them voluntarily appear in this cause or to plead, answer, or demur to plaintiff's bill—

It is, on motion of the plaintiffs, ordered that the said defendants and each of them do appear in the clerk's office of this court, at

Charleston, in this district, on the 20th day of April, 1885, and plead, answer, or demur to plaintiff's bill; and, it further appearing that it is not practicable to serve this order upon the said
52 defendants or any of them in person, it is ordered that the same be published once a week for four successive weeks in the Charleston Daily Times, a newspaper published in Charleston, in said district, prior to said 20th day of April, 1885, and that such publication when completed shall be equivalent to personal service of this order on such defendants.

Teste: JASPER Y. MOORE, *Clk.*

53 The affidavit of A. Burlew; filed Mar. 16, 1885, upon which the foregoing order of publication was granted, is in the words and figures following, to wit:

DISTRICT OF WEST VIRGINIA, *Charleston,* } *To wit:*

A. Burlew, agent and attorney for John Halsted in the chancery suit wherein said Halsted is complainant and A. G. Grinnan & others are defendants, pending in the U. S. district court at Charleston, in the district aforesaid, after being by the undersigned duly sworn, says that the whereabouts of the unknown heirs of Wm. K. Smith, if there be any, are unknown to *the to* him & to the said Halsted, as he is informed and believes; that A. G. Grinnan lives, or formerly lived, somewhere in the State of Virginia, but affiant says it is not practicable to serve the order of publication on him to appear, plead, answer, or demur to the complainant's bill; that the address or whereabouts of the said Grinnan is unknown to affiant. The said unknown heirs of the said Wm. K. Smith and the said A. G. Grinnan do not appear & have not appeared in this court, either in person or by attorney.

A. BURLEW.

Subscribed and sworn to before me this 16th day of March, 1885.

JASPER Y. MOORE,
Clk D. C. U. S., D. W. Va.

54 The affidavit of publication of the foregoing order is in the words and figures following, to wit:

STATE OF WEST VIRGINIA, *Kanawha County,* } *ss:*

A. M. White, being duly sworn, says that he is the publisher of the Charleston Daily Times, a daily newspaper published in the city of Charleston, in said county and State; that the notice, a copy of which is hereto attached, was published in said newspaper for

four consecutive weeks, commencing on the 18th day of March, 1885.

A. M. WHITE.

Costs, $8.75.

Subscribed and sworn to before me this 25th day of May, 1885.

Q. A. MARTIN,
Notary Public.

55 The demurrer of Wm. Wyant to the foregoing bill of complaint is in the words and figures following, to wit:

In the District Court of the United States for the District of West Virginia, Sitting at Charleston.

JOHN HALSTEAD
against
WM. WYANT & Others. } In Ch'y.

Demurrer of Wm. Wyant to the Bill of Complaint in the Above-Entitled Cause.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained to be true in the manner and form as the same are therein set forth, doth demur thereto, and for cause of demurrer showeth:

First. That said bill is not sufficient in law.

Second. That the plaintiff's remedy, if the matters and
56 things contained in said bill be true, is in a court of law, and a court of equity has no jurisdiction to grant the relief prayed for.

Third. The matters and things set forth in complainant's bill do not show a matter of equitable jurisdiction or a cause for which a court of equity could take cognizance.

Wherefore, and for divers other errors and imperfections, this defendant demands the judgment of this court whether he shall be compelled to make any further or other answer to said bill or any of the matters and things therein contained, and prays hence to be dismissed with his reasonable costs in this behalf sustained.

WM. WYANT,
By Counsel.

The undersigned, an attorney practicing in the district court of the United States for the district of West Virginia, certifies that in his opinion the foregoing demurrer is well founded in point of law.

J. F. BROWN.

57 Wm. Wyant, defendant named in the foregoing demurrer, being duly sworn, says the foregoing demurrer is not interposed for delay.

WM. WYANT.

Taken, subscribed, and sworn to before me this 6th day of May, 1885.

THOS. WHARTON,
Notary Public, Fayette Co., W. Va.

58 And at another day, to wit, at a district court of the United States for the district of West Virginia, continued and held at Charleston, in said district, on Saturday, the seventh day of November, A. D. 1885.

JOHN HALSTED
vs.
A. G. GRINNAN *et al.* } In Chancery.

This cause came on this day to be heard on the demurrer of William Wyant to the complainant's bill filed at a former term of this court, to which demurrer the complainant has joined, and the same being set down for argument *and* was argued by counsel. Upon consideration the said demurrer is overruled, and on motion of the complainant a rule is awarded him against the said William Wyant requiring him to answer the complainant's bill within ten days from this day.

59 And at another day, to wit, at a district court of the United States for the district of West Virginia, continued and held at Charleston, in said district, on Monday, the seventh day of December, A. D. 1885.

JOHN HALSTED
vs.
A. G. GRINNAN & Others. } In Chancery.

On this 7th day of December, 1885, the defendants, A. G. Grinnan & Wm. Wyant, severally tendered their separate answers to the bill of complaint, which are ordered to be filed, and the defendant Wm. Wyant files with his said answer the transcript of the record of the cause of A. G. Grinnan, trustee, *vs.* Long & others, from the circuit court of Greenbrier county, referred to, relied upon in his said answer.

60 The answer of A. G. Grinnan referred to in the foregoing order to the bill of complaint in this cause is in the words and figures following, to wit:

The separate answer to A. G. Grinnan to a bill of complaint of John Halsted, filed in the district court of the United States for the district of West Virginia, against A. G. Grinnan & others.

This respondent respectfully shows to your honor the Honorable John G. Jackson, judge of said court, that he did hold a tract of about two hundred acres of land on the Kanawha river, below Armstrong creek, in Fayette county, West Virginia, one-half thereof in his own right & one-half as trustee for Wm. K. Smith's creditors, the title to said land derived from G. T. Huddleston.

Your defendant further shows that he held for himself & as trustee five thousand acres on the waters of Armstrong creek, called Elk Ridge, & near the said tract of two hundred acres, & bought of W. H. Edwards; and also two thousand acres adjoining & to the west of the Elk Ridge tract of 5,000 acres, also con-
61 veyed to him by said Edwards, with rights attached to said tract of way through the said Elk Ridge tract, it being a fact well known that the minerals in the 2,000-acre tract, known as Forrest hill, could only be mined to advantage by roads or ways along Armstrong creek & its branches through the Elk Ridge tract, and that this right of way conveyed by deed from W. H. Edwards still pertains to the Forest Hill tract, and coal mining can be carried on with ease & facility through said roads & ways and in no other manner, and that it is not easy or practicable, owing to the topography of the country, to mine for coal on the Forest Hill tract through any frontage on the river or by the Huddleston tract, as your honor can see by inspection of a map of the properties herewith filed and marked Exhibit A. This respondent further shows that he did sell to the Forest Hill Mining Company the said tract of 2,000 acres, called Forest hill, and one hundred acres, to be taken off of the western side of the Huddleston tract, & that the said corporation was composed of citizens of
62 New York city, and was gotten up by Judge T. F. Cowan, and that he charges & believes that said Halstead was a member of & subscriber to said company & held about one-tenth of the stock therein, & that at the time of the conveyance by respondent to said company the members thereof & the respondent sent a nephew of said Judge Cowan to Fayette county, West Virginia, to lay off the said one hundred acres from the remainder of the tract, and that his name was John M. McKinney, and that he went to said Fayette county as the agent of John Halsted, the complainant, & others & of respondent, and as such agent he did *he did* engage Thos. S. Robson as surveyor and did lay off or have laid off the one hundred acres of the Huddleston tract, and that the respondent was not present & had nothing to do with laying off said dividing line, & that two members of Forest Hill Company, as authorized agents, were present, and that said McKinney directed the laying off of said dividing line with them & with their assent,
63 & that the plat of said one hundred acres was returned to the members of the Forest Hill Company in New York city, and that they approved of the action of their agent & took possession of the 100-acre tract, and held it by its lines separate & distinct from the other part of the Huddleston tract, and built houses on it in or about the year 1859, and during the long interval from that year to about this time your respondent has never heard of any claim that the lines were incorrectly run, and that he has held undisturbed possession of the said remaining part of the Huddleston tract, which is about 125 acres, for much more than twenty years, and any claim or deed set up by the complainant is barred by act of limitation.

The respondent further shows that the Forest Hill Mining Company made a small cash payment to him & executed a number of

coupon bonds for deferred payments, secured by deed—a deed of trust on the 2,000-acre tract & the said 100-acre tract—and that said company did not pay the said coupon bonds or any part thereof, and that the complainant, Halsted, bought up some of
64 them, and in 1864, during the late war, & when the respondent, a native of Virginia and resident therein, could not intervene & protect himself or those he represented, said Halsted did have the said properties of 2,000 acres & 100 acres sold in New York city by Robert Soutter, trustee, & did buy the same, as he learned & believes, for the small sum of forty-eight hundred dollars; and respondent further shows that at the time of the purchase by said Halsted he had a map of said 100-acre tract as laid off by his agent, McKinney, showing the line & courses, & that in or about the year 1870 he showed said map or plat to this respondent, and that he took possession of said 100-acre tract and placed a Dr. Hale as his agent & held possession thereof only by the lines of said map or plat, a copy of which, marked B, is herewith filed as an exhibit, and though respondent was frequently in Fayette Co. and at Dr. Hale's house on said 100-acre tract, he as agent for said Halsted never claimed any part of said 125-acre tract or anything
65 beyond the lines of said map or plat, and that he, Halsted, bought the tract with full knowledge of the dividing lines.

And respondent further shows that the Forest Hill Company aforesaid never paid the bonds for deferred payments & utterly failed to carry out their contracts with respondent, and if in existence would have no right to make any reclamation on him; and that said Halsted has no greater right than his predecessor in title has, nor has he any just right to complain, for the right of way through the 125-acre tract, part of the Huddleston tract, was expressly reserved to the Forest Hill Company & therefore to the owner of the said 100-acre tract, and that said Halsted has the right to go through said 125-acre tract if it — necessary to reaching or mining on the 2,000-acre tract, but this respondent distinctly denies that mining operations on the 2,000-acre tract can be carried on to any advantage, through either the 100-acre tract or the 125-acre tract of the Huddleston land. The respondent denies that
66 there was any fraud or deceit on his part, as the whole matter of division was arranged by the company through their own agent, & that he has never been over the tract only near the river, but he has learned that the forced sale of the Forest Hill Company property by John Halsted aforesaid during the late war & its purchase by him for — small sum aforesaid did constitute a fraud, perpetrated upon other holders of the bonds of said company, as the consideration was grossly inadequate.

And this respondent, A. G. Grinnan, further shows that in or about the year 1875, exact date not remembered, he did filed a bill in chancery against Cowan, Long, and others in Fayette circuit court, and that he, in an amended bill, did make John Halsted aforesaid a defendant & did inform him of the fact, and that the case was afterwards removed to Greenbrier circuit court, & that

under that suit this respondent did undertake to settle
67 his accounts as trustee aforesaid, and that it was under a decree of the Greenbrier circuit court that the 125 acres aforesaid were sold to Wm. Wyant, defendant, and that therefore said Halsted cannot now come forward and set up any claims in regard to said 125-acre tract, but should have asserted his rights, if he had any, in the proceedings of said case in Greenbrier county.

Since writing the foregoing this respondent has found a letter from said T. M. McKinney, giving an account of his said trip to Kanawha region, and it appears that two members of the Forest Hill Company were present at the division of said Huddleston tract, Messrs. Hale and Eames (a copy of this letter, marked Exhibit C, is herewith filed), and assented to said division, & said Hale was most probably acting also for Halsted.

And this respondent, A. G. Grinnan, further shows that complainant Halsted, buying his said property at a trustee's sale,
68 did receive or could only properly receive a special warranty deed and has therefore no right to make any reclamations upon him, and, further, that the 125-acre tract named in foregoing answer included 15 acres of another tract than the Huddleston tract & only included 110 acres of said tract. & the Forest Hill part having 105 acres, there was a nearly equal division of said Huddleston tract, though respondent did not contract with the Forest Hill Company for an equal division, but for about 100 acres, and they got more than 100 acres, and that there is no cause of complaint on part of said Halsted.

This respondent further denies that — was any covenant in his deed to the Forest Hill Company that the 2,000 acres & the Huddleston tract were coterminous, and insists that the survey and division made by McKinney, in the presence of, with assent of, representatives of the said company, in 1859, and assented — up to
69 this time, is binding and cannot be disturbed, & that lapse of time is a bar to any changes & reclamations, and asks that plaintiff be compelled to file a copy of the plat of said 100 acres, which he has had so long in possession, with courses & distances. The other part of the Huddleston tract, 110 acres, was retained by respondent for frontage purposes of Elkridge tract, though it was well known that it did not touch it; and further this respondent saith not.

A. G. GRINNAN.
S. A. MILLER,
Sol. for Resp'd't.

May 19, '85, Orange C. H., Va.

ORANGE C. H., ORANGE CO., *State of Virginia*, } *To wit:*

This day personally appeared before me, the clerk of Orange county court, in my office, A. G. Grinnan &, having been duly sworn, made oath that the statements contained in foregoing answer to

a bill of John Halsted, comprising seven pages, are true to the best of his knowledge & belief.

In testimony whereof I have set my hand & affixed my seal of office this 19 day of May, 1885.

[SEAL.] P. H. FRY, *Clerk.*

70 (Exhibit A referred to in the foregoing answer I do not find among the papers. L. B. Dellicker, cl'k.)

EXHIBIT B referred to in foregoing answer is in the words and figures following, to wit:

Forest Hill frontage, as surveyed by Thos. S. Robson under directions of I. M. McKenney & Dr. Hale & Mr. Eames, begins at a large sycamore on bank of Kanawha river at head of Withers' island; thence south 55¼° west 460 poles to two pines on a ridge in a line of original survey; thence, with said line, south 33° (33°) E. ten poles to a stake on said line; thence north 55¼° east 126 poles to a lynn, maple, dogwood, & ironwood on north hillside; thence north 80° east 84 poles to a pine, gum, & chestnut on point of a ridge; thence north 60° east 244 poles to a beech on the bank of the river; thence north 35° west 70 poles down & with river to the beginning.

Containing about 105 acres.

(See diagram marked p. 70.)

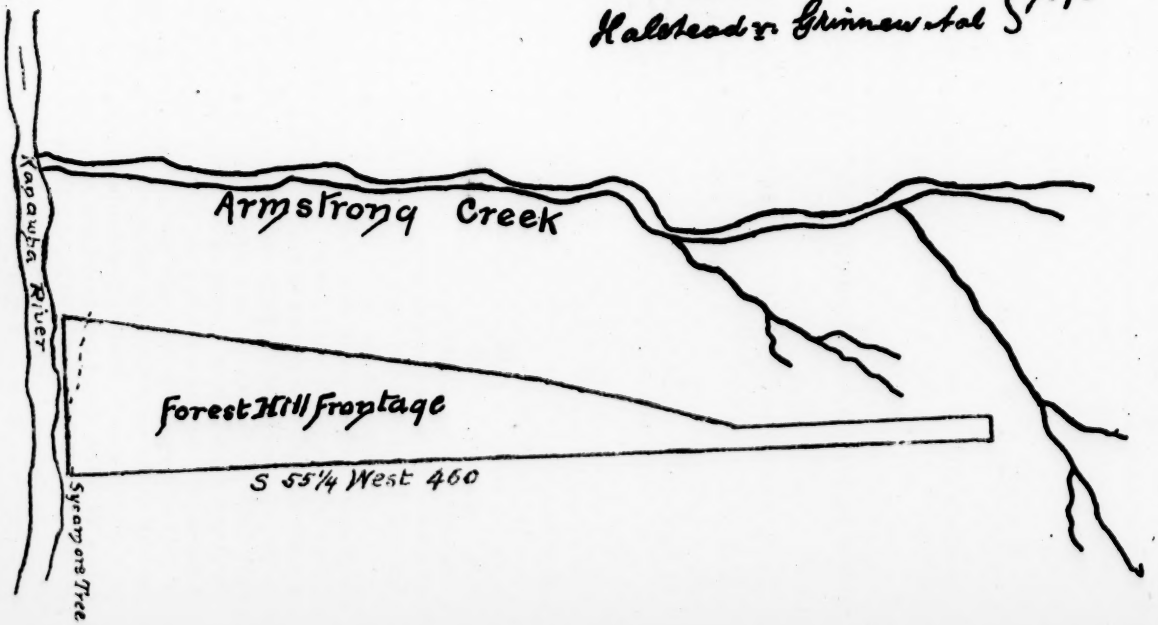
71 EXHIBIT C referred to in foregoing answer is in the words and figures following, to wit:

19 NASSAU ST., NEW YORK, *Aug.* 9, 1859.

A. G. Grinnan, Esq.

DEAR SIR: I should have written you before in regard to my trip to the Kanawha, but waited for the return of Capt. Smith, who was absent from the city when I got back, and I understand from him that you would probably soon be in New York. Owing to the many delays I experienced after leaving Parkersburg, I was just one week in reaching Huddleston's. I waited there the arrival of Dr. Hale and Mr. Eames, and proceeded to have a survey made of the Huddleston tract, and had one hundred acres set off as near as possible for the Forest Hill Co., subject to the approval of Smith & yourself. I enclose you a plat of the survey as made by Mr. Robson, the county surveyor. On my way from Charleston to Huddleston's I met Mr. Patton and learned from him that the papers from the clerk's office in Fayette Co. had been forwarded to you some
72 time before, & since my return I have been informed that you received them about the time I left New York. I regret that I did not know of the fact of your receiving them, as it would have saved you the expense of the trip & myself from an unexpected absence from home of three weeks. I think, though, that

No. 370.
Halstead v. Grinnell et al } p. 70



it was of great importance to all parties that the survey & divisi-ns of the Huddleston tract should have been made at once. It enabled the parties to commence operations at once exploring their coal beds & breaking ground for their works. I endeavored to subserve your interests as far as lay in my power. I have been informed within a day or two that Messrs. Hale & Eames have discovered a very valuable vein of cannel coal, & that they are progressing rapidly with their preparations for works. If I can be of any service to you in any way I shall be glad to do so.

Y'rs truly,

(Signed) I. M. McKENNY.

73 The answer of Wm. Wyant referred to in the foregoing order to the bill of complaint in this cause is in the words and figures following, to wit:

In the District Court of the United States for the District of West Virginia.

JOHN HALSTEAD
against
A. G. GRINNAN and Others. } In Equity.

The separate answer of Wm. Wyant to the bill of complaint filed in the above-entitled cause against him and others.

This respondent, saving and reserving all just causes of exception to the many errors and imperfections in complain-t's said bill contained, for answer to said bill or so much thereof as he is advised it is material for him to make answer to, answering, says that it is true, as alleged in said bill, that by deed executed on the 27th day of October, 1860, and dated on that day, A. G. Grinnan, for himself and as trustee for Wm. K. Smith, acquired the two-hundred-acre
74 tract mentioned and described in the papers of this cause as the "Huddleston tract;" which deed is filed as Exhibit "A" with said bill and is asked to be read as part of this answer.

And respondent says that afterwards, on the — day of ——, 1871, a suit in chancery was instituted in the circuit court of Fayette county, W. Va., against said Grinnan and others, and that afterwards at November rules, 1878, said Grinnan filed his bill in said court — said Chewning and others in the nature of a cross-bill in said cause for the purpose of selling, among other things, said Huddleston tract and subjecting the same to certain liens therein for the indebtedness of said Grinnan; that afterwards said causes were removed to Greenbrier county and there heard together and such proceedings had therein that a survey under the order of the circuit court of Greenbrier county was made of a portion of said tract and a plat with the metes and bounds of said portion returned and filed in said causes,
75 and afterwards, pursuant to a decree entered in said causes on the — day of ——, 18—, directing a sale of said lands so embraced by said metes and bounds, John W. Harris, Esq., special

commissioner, made sale of same by way of public auction in market overt by said plat, to wit, on the — day of ——, 1883, at which sale this respondent became purchaser at the price of $9,324.56; that afterwards, on the — day of ——, 1883, said sale was confirmed to this respondent by proper decree in said causes; that upon said confirmation respondent took possession of all the lands embraced in his said purchase and within the metes and bounds aforesaid, and has ever since so held possession of the same and every part thereof as his own, exclusively, continuously, notoriously, and adversely to the world, claiming it under his said purchase.

That respondent never knew or heard of any claim or title to the land so purchased by him or any part thereof on the part of
76 the plaintiff or any other person adverse to the title so bought by him until the filing of the bill in this cause. Respondent further says that after the institution of this suit, upon inquiry to ascertain cause for his being made party thereto, he found that the western boundary of the tract so purchased by him to be the eastern boundary of 105 acres laid off in 1859 by T. S. Robson and the agents of the Forest Hill Mining and Manufacturing Company for said company, under a deed claimed by them from A. G. Grinnan and others, dated the 15th day of June, 1859, the same filed with the bill as Exhibit "B."

Respondent will procure and file transcripts of the record of said chancery suits in Greenbrier county, with a map and decrees aforesaid, which are asked to be read as part of this answer.

Respondent further says that upon inquiry since the institution of this suit he has been informed that before the said Grinnan acquired the title to said "Huddleston tract," to wit, on the 15th day of June, 1859, the said Grinnan executed a deed, of which
77 Exhibit "B" is a copy, together with his wife and his *cestui que trust.*, W. K. Smith, and his wife, by which they purported to convey to said Forest Hill M. & M. Co. 100 acres to be surveyed off the western side of the said Huddleston tract, and that immediately after the execution of said deed said grantor or his duly authorized agents went upon said tract and selected said 100 acres and ran off the same under said deed in the manner most suited to their wants and purposes and thoroughly marked by a division line between the said 105 acres throughout its whole length across said tract, which division line so surveyed, marked, and adopted your respondent finds to be identical with the western line of the tract so purchased by him.

Respondent further says that he is informed, believes, and charges that immediately afterward the said company caused a plat to be made of the 105 acres so surveyed and laid off as aforesaid,
78 and sent a copy thereof to the said Grinnan *et al.*, with a notification that the 100 acres mentioned in said deed had been laid off by them in the manner in which they desired it should be and as shown by said plat for the approval of said grantors in said deed, all of which the said grantors did then and there confirm and ratify.

Respondent here asks that the letter and plat filed with the an-

swer of his codefendant, Grinnan, may be read as part of this answer.

Respondent further says that he is informed, believes, and charges that immediately after laying off the said 105 acres, as aforesaid, and the ratification thereof by said grantors, the said company took possession of the same as run off and agreed upon as aforesaid, and immediately constructed their building, factories, &c., and entered upon their business of mining coal and manufacturing oil therein, and continued said business for many years; and after the cessation of the same they, and after them the plaintiff, kept
79 said 105 acres so located in actual possession with one Dr. C. F. Hale, residing thereon and in charge thereof during all the period between the said running off of the said 105 acres and the date of this suit, the said Hale being one of the agents and members of said company, present and directing the said location of said line, having full knowledge thereof, and being, after the purchase allege- in the bill by said Halstead, the agent of the said Halstead, in sole charge of said land, the said company and after it the said Halstead at all times claiming the said 105 acres and said division line to be as run and located and marked as aforesaid and holding possession of said 105 acres up to said line and not otherwise.

Respondent further says that the purpose and intent of the said company and its agents in laying off the said 105 acres as shown in said plat was to secure for it as large river frontage as possible with bottom land upon which to construct their buildings and factories and carry on its said business, the back part of said
80 tract being rough and mountainous, the large body of mineral lands belonging to said company being provided with the right of way over the Elk Ridge tract to and down Armstrong creek to said river, said large tracts having no river frontage.

Respondent further says that he is informed, believes, and charges that immediately after the location as aforesaid of said division line the grantors in said deed to said company took possession of the residue of said tract up to said line as so located and held possession thereof up to and by said line, exclusively, continuously, notoriously, and adversely claiming said residue by said line to be their own from the date of its location in 1859 until the said purchase by this respondent and confirmation thereof by the court, at which date last aforesaid they transferred the same to this respondent. Respondent further says that he is an innocent purchaser of the lands embraced within the metes and bounds by which
81 he bought as aforesaid for valuable consideration, to wit, the said sum of $9,324.56; that he never had any notice or knowledge, actual or constructive, of the deed, Exhibit "B," from Grinnan and others to said company, or of any deed or claim of any person to any part of the lands embraced within his said boundary.

Respondent expressly denies any and all charges contained in the bill to the effect that he had any notice or knowledge before or at the time of said purchase or prior to the institution of this suit of

said deed from Grinnan and others to said company or to any other deed or claim to lands so embraced by his said boundaries or of any question or controversy concerning any of said boundary lines, but, on the contrary, says that he was informed and believed that each and every of said boundary lines were well established and undisputed, and respondent says that by reason of the fact that the legal title to said Huddleston tract was acquired by said Grinnan
82 and others after said deed to said company was recorded he is advised and charges that he is not affected with notice thereof by reason of said recordation.

Respondent further says that he is informed and charges that the said Halstead, plaintiff, was and is a party to the chancery proceedings aforesaid in which said sale to respondent was made, by reason whereof his, said Halstead's, title, if he had any, to any part of the lands embraced within respondent's said boundary vested in respondent by his said purchase, and the said Halstead is now estopped to controvert the line by which said sale was made.

Respondent further says that the division line having been located and established as aforesaid by the parties to said deed and recognized and acted upon by all concerned without question for a period of more than 26 years without fraud or mistake on the part of the grantors or those claiming under them and with full
83 knowledge of all the facts, their claim to now change said line is stale and barred by the statute of limitations, which is here relied upon as if more specially pleaded.

Respondent charges that said Halstead was a member of said original company and had full knowledge of said location of said division line and a copy of the plat thereof so made in 1859, and was so informed and had said plat at and prior to the date of his said purchase from Soutter, trustee, and having so held out said line as the true division line is estopped to assert a different one to the prejudice of an innocent purchaser.

Respondent denies that said deed from Grinnan and others to said company conveyed or was intended to convey ½ of said Huddleston tract, but, on the contrary, says that 100 acres was all said company bargained for or was entitled to under said deed, and by said division line as so located said company got 5 acres more
84 than it was entitled to; and respondent further says that only 100 acres of said tract were granted by either said deed to or said deed from said Soutter, trustee, and denies that either of said deeds conveyed or was intended to convey ½ of said Huddleston tract. Respondent denies that said division line was only drawn in part and never completed or that said property has lain idle from 1859 to the present time. Respondent further denies that said division line was run at the sole instance of the grantors, but, on the contrary, it was run at the instance of said company and under the dictation and supervision of its agents in the manner hereinbefore stated.

Respondent further denies any accident, fraud, deceit, or mistake in the running and location of the division line as charged in the bill.

Respondent further denies that the plaintiff is in the posi-
85 tion of a joint owner of an undivided interest in said Huddleston tract, and further denies each and every allegation and statement in the bill contained in anywise in conflict or inconsistent with any of the allegations of this answer; and, having fully answered, respondent prays to be dismissed hence with his reasonable costs in this behalf most wrongfully incurred.

WM. WYANT.

L. G. GAINES &
J. F. BROWN, *Sol's.*

STATE OF WEST VIRGINIA, } *To wit:*
Fayette County, }

Wm. Wyant, respondent in the foregoing answer, being duly sworn, says that the facts and allegations therein contained are true except so far as therein stated to be upon information, and so far as they are there stated to be upon information he believes them to be true.

WM. WYANT.

Taken, subscribed, and sworn to before me this 19 day of November, 1885.

THOS. WHARTON,
Notary Public, Fayette Co., W. Va.

86 The record referred to in the foregoing order and also in the said answer of William Wyant is in the words and figures following, to wit:

STATE OF WEST VIRGINIA:

Pleas Before the Circuit Court of Greenbrier County.

Be it remembered that heretofore, to wit, on the 26th day of September, 1878, came A. G. Grinnan, &c., by counsel, and sued out of the clerk's office of the circuit court of Fayette county a summons in chancery *vs.* S. C. Long & others; which summons, with the return thereon made, is in the words and figures following:

Summons.

STATE OF WEST VIRGINIA:

To the sheriff of Fayette county, Greeting:

We command you that you summon S. C. Long, G. W. Norris, P. W. Morgan, late sheriff of Kanawha county, and as such sheriff committee adm'r of Wm. K. Smith, deceased; Gustavus B. Wallace, Edwin Carter, Patsey Dillard, the personal representative of Wm. J. Roberts, whose name is unknown; Jas. Gray, Louisa B. Hoe, Wm. H. Fitzhugh, ex'r of H. H. Parton, —— Emanuel (whose baptismal name is unknown), adm'r of H. Phillips; George Hamilton, the

87 Forest Hill Mining & Manufacturing Company, John Halstead, F. B. Chewning, in his own right and as adm'r of Abigail H. Smith, and all creditors of Wm. Smith whose debts have been acknowledged in writing by him to be just and who are entitled to any share of the trust fund created by the aforesaid deeds to A. G. Grinnan of 29th of October, 1857, and of the 18th of February, 1859, whose names are unknown, if — be found in your bailiwick, to appear before the judge of our circuit court for the county of Fayette, at rules to be held in the clerk's office of said court on the first Monday in November next, to answer a bill in chancery exhibited against them in our said court by A. G. Grinnan, in his own right and as trustee under deeds executed by Wm. I. C. Smith, dated October 29th, 1857, and Feb'y 18th, 1859; and have then there this writ. Witness E. H. Easley, clerk of said court, at the court-house of said county, on the 26th day of September, 1878, and in the 16th year of the State.

E. H. EASLEY, *Clerk.*

Return.

None of the defendants found in my bailiwick.
Sept. 26th, 1878.

T. R. COOPER, *Dep'ty,*
For C. A. McCLEURY, *S. F. C.*

88 A. G. GRINNAN, Trustee, &c., *vs.* S. C. LONG *et als.* } Affidavit.

A. G. GRINNAN, who sues in his own right and as trustee under deeds executed by William F. C. Smith, dated October the 29th, 1857, and February the 10th, 1859, Plaintiff,

vs.

S. C. LONG, G. W. NORRIS, P. W. MORGAN, late sheriff of Kanawha county, and as such sheriff committee administrator of William K. Smith, deceased; Gustavus B. Wallace, Edwin Carter, Patsy Dillard, the personal representative of William F. Roberts, dec'd, whose name is unknown; James Gray, Louisa B. Hoe, William H. Fitzhugh, executor of H. H. Parton; —— Emanuel, whose Christian name is unknown, administrator of H. Philips, deceased; George Hamilton, The Forest Hill Mining and Manufacturing Company, John Halstead, F. B. Chewning, in his own right and as administrator of Abigail H. Smith, dec'd, and all creditors of William Smith, dec'd, whose debts have been acknowledged in writing by him to be just and who are entitled to any share of the trust fund created by the aforesaid deeds to Andrew G. Grinnan of the 27th of October, 1857, and of the 10th day of February, 1859, whose names are unknown, Defendants.

89 ORANGE COUNTY, VIRGINIA, *To wit:*

Andrew G. Grinnan this day *made oath* before me, John G. Williams, a com'r in chancery in & for said county, & made oath be-

fore me, in said county, that all the foregoing defendants except P. W. Morgan are non-residents of the State of West Virginia.

A. G. GRINNAN.

Sworn to and subscribed by A. G. Grinnan before me this 16 day of Sept., 1878. JOHN G. WILLIAMS, *Co. C'k.*

A. G. GRINNAN, Trustee, &c., *vs.* S. C. LONG *et al.* } Affidavit of Posting Ord. Pub.

STATE OF WEST VIRGINIA, *Fayette County,* } *ss:*

This day personally appeared before me, the undersigned authority, E. H. Easley, clerk, and made oath that the annexed order of publication in ch'y suit of A. G. Grinnan, trustee, &c., *vs.* S. C. Long *et als.* was published in the Fayetteville Enterprise, a newspaper printed in Fayette county, West Virginia, for four successive weeks; that the 1st incertion thereof was on the 8th of October, 1878, and that on the 9th day of October, 1878, he posted a
90 copy of said order on the front door of the court-house of Fayette county.

Sworn to before me this 16th January, 1879.

M. G. DAVIS, *Cl'k.*

Chancery Notice.

STATE OF WEST VIRGINIA, *Fayette County,* } *ss:*

At rules held in the clerk's office of the circuit court of Fayette on the first Monday in the month of October, 1878.

A. G. GRINNAN, who sues in his own right and as trustee under deed executed by Wm. F. C. Smith, dated October 29th, 1857, and February 10th, 1859, Plaintiff,

vs.

S. C. LONG, G. W. NORRIS, P. W. MORGAN, late sheriff of Kanawha county, and as such sheriff committee administrator of Wm. K. Smith, deceased; Gustavus B. Wallace, Edwin Carter, Patsy Dillard, the personal representative of Wm. L. Roberts, deceased, whose name is unknown; James Gray, Louisa B. Hoe, Wm. H. Fitzhugh, executor of H. H. Parton; —— Emanuel, whose Christian name is unknown, administrator of H. Philips, dec'd; George Hamilton, The Forest Hill Mining and Manufacturing Company, John Halstead, F. B. Chewning, in his own right and as administrator of Abigail H. Smith, deceased, and all creditors of Wm. J. Smith, deceased, whose debts have been acknowledged
91 in writing by him to be just and who are entitled to any share of the trust fund created by the aforesaid deeds to Andrew G. Grinnan of the 29th of October, 1857, and of the 10th of February, 1859, whose names are unknown, Def'ts.

In chancery.

The object of this suit is to obtain directions how to manage and

distribute the trust estate in the hands of the plaintiff, and particularly whether he ought to sell at once the lands mentioned in said trust or to postpone the same until a more favorable time and to convene all the creditors of W. K. Smith, dec'd, and have an account thereof stated, and that the court direct a distribution according to their priorities.

This day came the complainant, by cou-sel, and, on his motion and it appearing by affidavit filed that the defendants above named, except P. W. Morgan, are non-residents of this State, it is ordered that they do appear here at rules to be held in the clerk's office of the circuit court of said county on the first Monday in the month of November, 1878, and do what is necessary to protect their interests in this suit.

Teste: E. H. EASLEY, *Clerk.*

92 Be it remembered that heretofore, to wit, at rules held in the clerk's office of the circuit court of Greenbrier county, West Virginia, on the first Monday in November, 1878, came A. G. Grinnan and filed his bill of complaint against S. C. Long and others; which bill is in the words and figures following, to wit:

Bill of Complaint.

A. G. GRINNAN, in his own right and as trustee under deeds executed by Wm. F. C. Smith, dated October 29th, 1857, and Feb'y 10th, 1859, Plaintiff,

vs.

S. C. LONG, G. W. NORRIS, P. W. MORGAN, late sheriff of Kanawha county, and as such sheriff committee adm'r of Wm. K. Smith, dec'd; Gustavus B. Wallace, Edwin Carter, Patsy Dillard, the personal representative of Wm. J. Roberts, whose name is unknown; Jas. Gray, Louisa B. Hoe, Wm. H. Fitzhugh, ex'r of H. H. Parton; —— Emanual (whose babtismal name is unknown), adm'r of H. Phillips, George Hamilton, The Forest Hill Mining and Manufacturing Company, John Halstead, F. B. Chewning, in his own right and as adm'r of Abigail Smith, and all creditors of Wm. Smith whose debts have been acknowledged in writing by him to be just and who are entitled to any share of the
93 trust fund created by the aforesaid deeds to A. G. Grinnan of 29th of October, 1857, and of the 10th of Feb'y, 1859, whose names are unknown, Defendants.

The plaintiff complains and says that on the — day of ——, 187–, F. B. Chewning filed his bill in the circuit court of Fayette county, West Virginia, against this plaintiff (A. G. Grinnan) in his own right and as trustee aforesaid, J. F. Cowan, S. C. Long, J. W. Norris, Abigail Smith, P. W. Morgan, sheriff, committee adm'r of Wm. K. Smith, and the creditors of Wm. K. Smith whose debts he has acknowledged in writing to be just, but whose names are unknown; that in the said bill he alleged that Wm. K. Smith, who at

the time owned the property thereinafter more particularly described by a deed dated October 29th, 1857, conveyed on its face in fee simple to A. G. Grinnan the following real estate in Fayette county, West Virginia, viz., 43,000 acres, more or less, which was conveyed by Wm. H. Edwards to said Smith Dec'r 2d, 1852; also the interest of said Smith in 7,000 acres of land on Armstrong creek conveyed to said Smith by said Edwards on the 1st of August, 1853; also the remaining half of 200 acres of land on the Kanawha, below Armstrong creek, being the tract contracted to be conveyed
94 to said Edwards for the benefit of said Smith by George Huddleston; also a tract of 15 acres patented to S. H. Brannon on 11th Nov'r, 1854, and conveyed to said Smith by said Edwards on the 7th of October, 1857; that, although this deed from Wm. K. Smith to the said A. G. Grinnan of the 29th of October, 1857, was on the face a deed of absolute direct conveyance of the entire subject in fee simple to the said A. G. Grinnan, there was in fact a secret trust as to the great part of said property coupled with said conveyance. It was at the time of said conveyance believed that the said A. G. Grinnan would be able to effect a sale of said property in a very short time, and that a direct absolute conveyance of the whole subject to him in fee simple would facilitate such sale and simplify the conveyance to any one or more purchasers; that after a lapse of some time without a sale having been effected, at the suggestion of said Grinnan, it was determined to express in writing the precise intention of the parties to said deeds and the character of the secret trust coupled therewith. Accordingly, on the 10th day of Feb'y, 1859, they entered into a written agreement by which the nature, extent, and object of the said secret trust was set forth and the powers and duties of the said Grinnan were defined; that in the recitals of said agreement it was
95 set forth that by the aforesaid deed of 29th October, 1857, the said Smith conveyed to said Grinnan all of said property, to wit, one half of Forest Hill tract of 2,000 acres, the other half having been conveyed to said Grinnan in fee simple; also a tract of 15 acres named in said deed of Oct. 29th, 1857 (one-half of which said Grinnan holds in fee simple, holding the other half for the purposes thereinafter named), together with the remaining part of Wilson's survey lying east of the Mt. Carbon Company and supposed to contain 35,000 acres, which is the same tract before described as containing 40,000 acres, of which 12,000 had been conveyed to secure a debt due to Gustavus B. Wallace; that after these recitals the said contract and agreement proceeds to state that "therefore it is understood and agreed that the said Grinnan shall hold one-half of the 15 acres in fee simple, and that the remaining half of the property conveyed in the said deed, viz., one-half of the Huddleston tract (the other half having been conveyed to s'd Grinnan in fee simple by said deed of Oct. 29th, 1857), one-half of the 15-acre tract, and the balance of the Wilson survey shall
96 be held by the said Grinnan in the following manner, viz., that he shall have the right to create lines on said property to raise money to pay expenses incident to selling it; that he may

sell said property or any part of it at private sale, and after six months at public sale, upon such terms as he may deem best, paying from the nett proceeds of the sale the debts due or which may become due said Grinnan from said Smith or for which said Grinnan may be or become bound as security for said Smith either before or after the date of said agreement, including, among other items, several debts due said Grinnan and especially recited in said agreement, one of which is due to him as guardian of the children of Wm. H. Conway, together with expenses incurred in selling or endeavoring to sell said property, and a proper remuneration to said Grinnan as trustee, but not to be less than 5 per cent.; 2d, to pay after said claims (which are of the first class) the debts acknowledged in writing by the said Smith to be just (except the claims of Dodge, Bacon & Co., otherwise provided for), including $25,000 due to Mrs. Abigail Smith, the wife of said Wm. K. Smith, to be held in trust by said Grinnan for her separate use & benefit and
97 subject to her disposal by will or order, the interest thereon to be paid annually; also the sum of $10,000 due to said complainant, the exact sum supposed to exceed this sum; that said complainant in his said bill alleged that the said sum intended to be thus provided for did actually exceed the said amount of $10,000.00; that said agreement was admitted to record on the 10th of March, 1859, in the clerk's office of the county court of Fayette county, West Virginia; that at the time of said agreement and down to his death the said Wm. K. Smith was deeply embarrassed by his debts. He further alleged that the said A. G. Grinnan had recently sold to S. C. Long and G. W. Norris the said tract of 35,000 acres and the said 5,000 acres, except some small parcels thereof, which he had previously sold to others; that a sale of said property was necessary to redeem it from tax sales, the time for redeeming which had nearly expired, and also to prevent a sale of the said 12,000 acres under the aforesaid trust deed in favor of Gustavus B. Wallace; that after this sale had been made one J. F. Cowan came forwarded and asserted a claim to the said property; that said com-
98 plainant made other allegations in his said bill in regard to the said J. F. Cowan, which need not be here repeated, because all of the questions put in issue by the said bill, so far as the said Cowan was concerned, have been compromised and settled; that by said bill the said plaintiff prayed that proper parties therein named should be made parties defendant thereto, and, besides praying for relief against the said Cowan, he prayed that the said Grinnan be required to show what land he had sold to said Norris and Long and for what price; that Norris and Long be required to file with their answers a copy of this contract with Grinnan; that said Grinnan be required to apply the purchase-money received from said Norris and Long to the purposes of the trusts, and especially to pay the debt secured to the said complainant according to the amount actually due, and for general relief.

Your orator further alleges that on the 23d of May, 1872, a decree was entered by the consent of the parties in the said cause, in which

it was ordered that your complainant, A. G. Grinnan, do
99 settle his trustee accounts before John A. Preston, Esq., who was thereby appointed a commissioner for that purpose and was authorized to take, state, and report said accounts in which he was directed to credit your complainant, Grinnan, with the sum of $8,000, paid the aforesaid John F. Cowan and his assignees on the 7th of May, 1872, upon compromise, and notice of the time and place of taking said account was directed to be published in a newspaper in the town of Lewisburg for four successive weeks to be equivalent to personal service and to report his proceedings; that under said decree your orator, A. G. Grinnan, made a settlement before the said commissioner as trustee, and said commissioner stated said account and made report thereof to the court; that on the 1st of April, 1873, the said cause came on to be heard upon the papers formerly read and the said report, to which there was no exception, and said decree, after reciting that "it appearing from said report that on the 15th day of June, 1872, the trust estate held by said A. G. Grinnan was indebted to him, as trustee, in the sum of $2,832.60 cents, decreed that the said A. G. Grinnan recover against said trust estate the debt & interest aforesaid until paid and
100 the cost expended by him in said suit, "with the amount whereof he shall be entitled to a credit in his future settlement as trustee;" and by the said decree said Preston, as commissioner, was ordered to take and report any subsequent accounts which may accrue with said trustee, and he was directed to give notice of the time and place as before ordered or by personal service, and on the 28th of August, 1873, another decree was entered in said cause in which it was "decreed that the order made in this cause at a previous term of the court directing an account to be taken by John A. Preston, special commissioner of accounts of the said Grinnan as trustee, be so enlarged as to require the said commissioner, Preston, to convene all the creditors of the trust fund in the hands of said trustee by publication of the time and place of taking said accounts and notice to all said creditors to appear and produce their debts, duly verified, for six consecutive weeks in the Greenbrier Independent, a newspaper published in the town of Lewisburg, & posted for four weeks at the court-house door of this (Fayette) county, and report the same to court with the evidence on which the same is based;" that on the 31st of March, 1874, another
101 decree was entered in the said cause in the following words, viz: "This cause came on to be heard upon the papers formerly read and report of Commissioner Jno. A. Preston, appointed to settle with A. G. Grinnan, trustee and defendant in this cause, to which report there is no exception filed, and was argued by counsel, on consideration whereof it is adjudged, ordered, and decreed that said report be confirmed, and that said commissioner, Preston, continue to take, state, and report upon the accounts of the said A. G. Grinnan, trustee, from time to time until the trust shall be closed and completed after convening the parties and creditors by publication in a newspaper published in the town of Lewisburg for four successive weeks and at the court-house door of this county

fixing the time and place of taking said accounts; and it is further adjudged, ordered, and decreed that the said Grinnan proceed to collect the debts coming to him as such and pay over and satisfy the debts in the first, second, and third class in their order as ascertained in the report of said Commissioner Preston, and that
102 he continue to make annual settlements before said commissioner until the duties of his trust shall be fully closed." Copies of said decrees are herewith filed as Exhibits 1, 2, 3, 4; that the debts which your complainant was directed to collect by the last-named decree were due on account of the sale of lands in West Virginia named and described in the aforesaid agreement between said Wm. K. Smith and the said A. G. Grinnan, dated Feb. 10th, 1859, in which the trusts confided to said Grinnan as to the said lands were set forth, defined, & limited; that besides the lands sold to Norris and Long there were several other parcels of the aforesaid land sold to other parties who afterwards failed to pay for them and proved to be insolvent, and the said sales were consequently cancelled; that these lands are a part of the Loup Creek tract of 35,000 acres sold to Norris and Long, but which had been sold before the sale to Norris and Long, and were consequently excepted from the sale to them. These parcels of land contain about 200 or 300 acres; that besides these there remains one-half of another tract of 125 acres lying below the mouth of
103 Armstrong creek, in the said county, which also remains unsold, one-half of which belongs to said trust estate; that these lands ought to be sold, inasmuch as there will be a deficiency of the trust estate for the payment of the debts to which said trust estate has been dedicated by the aforesaid deeds; that some time prior to the late civil war the Forest Hill tract was sold to the Forest Hill Mining & Manufacturing Co. and conveyed to the said corporation by the said Wm. K. Smith and wife and A. G. Grinnan and wife and the said A. G. Grinnan as trustee; that prior to said conveyance the said Wm. K. Smith and wife had conveyed to your complainant one-half of the Forest Hill tract of land by deed with covenant of general warranty; that in the said deed to the Forest Hill Mining and Manufacturing Co. the said Smith covenanted with said company to warrant generally the remaining half of the said property which he had not theretofore conveyed to A. G. Grinnan, and the plaintiff, A. G. Grinnan, warranted generally the title to that half of the said property which the said Wm. K. Smith had conveyed with general warranty to him, and
104 as trustee the said Grinnan conveyed with special warranty that half of said tract of land which Smith and wife conveyed to said company; that the said Forest Hill Mining and Manufacturing Company subsequently sold and conveyed by deed with general warranty all of the said Forest Hill tract to one Jno. Halsted; that not long since and subsequent to the conveyance to him the said John Halstead instituted a suit in the circuit court of the United States against a certain party for the recovery of a part of said land, which part the said party had taken possession of; that the said suit is still pending and undetermined; that the plaintiff

does not know the precise amount of said land thus in controversy, but from the information he has he believes it is about 100 acres; that if the said Halstead fail to recover the said land which is involved in the said suit he will no doubt claim to have recourse back upon the said Wm. K. Smith as to that half of which he conveyed with general warranty, and upon the plaintiff for the other half, and your orator will have recourse back upon Smith for whatever liability he may be under, if any, to the said Halstead; that if such liability against your orator be asserted and established against
105 him he will assert his right to have it paid or reimbursed to him as a debt or liability of said Smith to him, provided for in the deed of Oct. 29th, 1857, and Feb'y 10th, 1859, in the first class; that enough of the trust fund ought to be returned to meet the aforesaid contingent liability; that in said deed of Grinnan, trustee, Grinnan and wife and Smith and wife to the Forest Hill Mining and Manufacturing Co. a right of way was granted from the said Forest Hill tract through the Elk Ridge tract of 5,000 acres; that since then the said Elk Hill tract has been sold under decree of court to enforce payment of a balance of unpaid purchase-money due to said Wm. H. Edwards by the said Wm. K. Smith and brought by the said Edwards; that this proceeding was had during the late war; that a suit is now pending in the circuit court of Kanawha county between your complainant and the said Chewning & Abigail H. Smith, widow of Wm. K. Smith, on the one side, and the said Wm. H. Edwards, on the other, to set aside the proceedings in and the sale under the decree in said suit as null and void; that if this suit be decided in favor of said Wm. H. Edwards the said Jno. Halsted will doubtless set up a claim against the said Wm. K. Smith's estate and it may be against the said trust
106 fund in the same way as above shown in the case of his failing to recover the aforesaid 100 acres of the Forest Hill tract, and a part of the said trust estate ought to be reserved to meet this contingent liability also; that this right of way is deemed of great value to the Forest Hill tract; that since the last decree entered in the aforesaid suit of Chewning *vs.* your complainant, S. C. Long, and others, your orator has been advised that there is doubt as to whether this your honors' court has jurisdiction to enter the decree aforesaid ordering the said accounts to be taken of his transactions as trustee aforesaid, because the questions of the taking of said accounts and of ascertaining the debts chargeable upon said fund and the convening of said creditors before the court for the purpose of distributing the said fund were not put directly in issue in the pleadings in the said cause and because your complainant, the trustee, whose accounts were ordered to be settled, and the creditors whose names are known are residents of the State of Virginia.

The plaintiff humbly submits that the facts stated in this bill, in addition to those stated in the aforesaid bill of F. B. Chewning, every
107 one of which, so far as recited in the bill, the plaintiff here reiterates, adopts, and charges to be true, and especially the fact that there is real estate belonging to the trust estate which lies in Fayette county, West Virginia, which ought to be sold

and applied towards the payment of the debts charged upon said trust estate, remove every doubt as to the jurisdiction of this court. Your orator further alleges that the said trust estate is not sufficient to pay all the debts charged upon it and that portion of it which remains lying in Fayette county, West Virginia, in the shape of land is wholly inadequate to pay said debts; that the plaintiff desires the advice and opinion of the court as to how to manage and distribute this trust estate and humbly submits to the consideration of the court the following grounds upon which he asks it:

1st. The trust real estate lying in the county of Fayette, West Virginia, ought to be sold, but it is a question of serious doubt as to whether it ought to be sold now or several years hence. If it be sold at once for what it will bring it is almost certain that in the present period of extreme financial stringency it will have to be sold at little more than a nominal price, whereas if the sale be postponed for some years it will probably bring its full value.

108 2. The creditors provided for as second-class creditors are only described by the general designation as those having "debts acknowledged in writing by the said Smith to be just." Who they are and where they reside is not known to your orator further than that he has come to a knowledge of a number who reside in the State of Virginia, but whether these are all or not and, if not, whether any reside in West Virginia or some other State he does not know, and he needs the aid of the court to convene them that he may, without personal liability, distribute the fund, at least that part which consists of real estate in Fayette county, West Virginia. Your orator further says that he is advised the court has full and complete jurisdiction over the questions in issue in the aforesaid suit of chancery against Cowan, the plaintiff, and others; that in adjudicating the questions involved in that case it became necessary to direct the payment to the said Cowan of a part of the first fund; that *that* in doing this it was proper to take an account of said trust fund to ascertain whether there was enough to pay said Cowan the amount ascertained to be due him and to order the collection of at least that amount; that accordingly such settlement was ordered and such collection was decreed to be made as were proper to be ordered and decreed to be done; that

109 in this way a part at least, if not all, of the trust estate was properly brought under the jurisdiction and control of this court; that the creditors of the second class, who were then unknown, were before the court as unknown parties; and your orator further says that, as he is advised, the settlements which he has already made were properly made under the order of a court having jurisdiction of the subject. The plaintiff further says that inasmuch as the court under this bill has jurisdiction of that part of the real estate which consists of real estate in the county of Fayette, West Virginia, it is proper that this bill and the said cause of Chewning *vs.* Cowan & others should hereafter be heard together or that this bill ought to be treated as a cross-bill in that case; that this court ought to take jurisdiction of the whole trust fund and distribute the same amongst the parties thereto entitled according to

their respective rights; that inasmuch as the trust estate is inadequate to pay all the debts charged upon it and these debts are unascertained and can only be ascertained by the aid of the court of chancery, and this court has to ascertain these creditors, the amounts of their respective debts, their priorities, the amount of the trust estate, what has been paid out and to whom, in order to en-
110 able it to know how and to whom to distribute the fund under its jurisdiction & control it is eminently proper that it, sitting as a court of chancery, should distribute this entire trust fund, and especially as the trustee, though a resident of another State, voluntarily submits himself to the jurisdiction of this court and asks its aid in administering the fund, and the balance of the fund which does not consist of real estate lying in the county of Fayette, West Virginia, is the proceeds of the sale of real estate in said county; that no other court has taken jurisdiction of any part of the fund; that — is proper that the accounts of the plaintiff as trustee should be settled; that he is willing and desires in view of the doubts raised in regard to the validity of the settlements already made by him in the case of Chewning *vs.* Cowan, Norris, & others that the same may be reconsidered and leave given to any party to file exceptions thereto and to take any evidence in reference thereto and if there are any errors therein that they may be corrected, but if no exception be taken to them or no error be found therein then let them be ratified and confirmed; but he claims and insists that his said settlements were made and ratified under decrees of a court of competent jurisdiction and are valid and binding. He, however, under the circumstances, agrees that they may be surcharged & falsified if they contain any
111 error, but he insists that they shall be held to be *prima facie* correct; that among the creditors of the said Smith who claim to have debts acknowledged in writing by said Smith to be just the plaintiff has heard of Edwin Carter, Patsy Dillard, the personal representative of Wm. J. Roberts, Jno. Gray, Louisa Hoe, Wm. H. Fitzhugh, ex'or of H. H. Porter; S. C. Jones, —— Emanuel (whose baptismal name is unknown), adm'r of H. Philips, and George Hamilton; that the said Smith, prior to the execution of said trust deed, had many transactions, some of them quite large, with persons who resided in what is now West Virginia or who now reside in said State and some with parties in Fayette county, but whether any are creditors whose debts are secured by said deeds or who claim to have them so secured the plaintiff does not know, nor does he know of any who have claims, contingent or otherwise, against said fund except those whom he has hereinbefore named. There may be many others in different States. Now, forasmuch as your complainant is without adequate relief in the premises save in this honorable court, sitting as a court of chancery, and—

To the end that S. C. Long, J. M. Norris, P. W. Morris,
112 sheriff, committee adm'r of Wm. K. Smith, dec'd; Gustavus B. Wallace, Edwin Carter, Patsy Dillard, the personal representative of Wm. J. Roberts, whose name is unknown; James Gray, Louisa B. Hoe, Wm. H. Fitzhugh, ex'or of H. H. Porter; —— Eman-

uel (whose baptismal name is unknown), adm'r of H. Philips; Geo. Camilton, Forest Hill Mining and Manufacturing Company, John Halsted, F. B. Chewning, in his own right and as adm'r of Abigail H. Smith, and all creditors of Wm. K. Smith whose debts have been acknowledged in writing by said Smith to be just, whose names are unknown, may be made parties defendants to this bill and answer each allegation thereof; that the court may advise and direct the plaintiff how to manage and distribute the aforesaid trust estate in his hands, and particularly whether he ought to sell at once the lands aforesaid in Fayette county or postpone selling them till a more propitious time; that the court may further advise him what debts are included under the designation of "debts acknowledged in writing by Wm. K. Smith to be just;" that the court may convene said creditors and all other persons who have any claim whatever against the said trust estate and ascertain whether such claim is valid and, if valid, the amount thereof
113 and the order of priority in which it ought to be paid; that the aforesaid cause of Chewning *vs.* Cowan, Norris, Long, this plaintiff, and others may be heard together with this bill or this bill treated as a cross-bill filed in said case; that the court may take charge of the whole trust estate and distribute the same among the parties thereto entitled according to their respective rights; that the court may ascertain the amount of the said trust estate, what has been paid out, and to whom; that the accounts of your orator as trustee aforesaid may be settled; that the settlement of his accounts as trustee heretofore made in the case of Chewning *vs.* Cowan and others may be referred to a master commissioner of the court, with leave to any party interested to file exceptions thereto and take evidence in reference to the same and to be reconsidered & referred as may appear to be proper, but if no exception be taken thereto or if no error appear therein to be ratified and confirmed; that all persons who have any claim against the said trust estate may be required to bring forward and establish the same by proper evidence; that the said estate may be distributed according to the rights
114 of the parties entitled to it, and that your honor will grant all such further relief in the premises as may be proper.

Let a subpœna go, &c.

Rules Endorsed on Foregoing Bill.

Oct. rules, 1878.

Affidavit filed, & order publication, & continued for order.

Nov. rules, 1878.

Summons returned & executed; bill & exhibits filed & decree *nici;* order pub. complete.

Dec'r R., 1878.

Bill taken for confessed & set down for hearing.

WEST VIRGINIA:

At a circuit court held for Greenbrier county, at the court-house thereof, on the 10th day of July, 1882.

A. G. GRINNAN
vs.
S. C. LONG

and

F. B. CHEWNING
vs.
COWAN *et als.*

For reasons appearing to the court it is ordered that the decree entered in these causes on a former day of this term be set aside.

On the motion of Andrew G. Grinnan leave is granted to him to withdraw the petition heretofore filed by him in these causes and the exceptions heretofore taken by him to the reports made
115 in these causes by Commissioner John A. Preston, and the said petitions and exceptions are accordingly withdrawn. Alexander F. Matthews, as the receiver of this court, this day made his report of his action under the orders heretofore entered in these causes, by which it appears that a judgment was recovered in the circuit court of Madison county, in the State of Virginia, at the September term, 1881, of said court, in his name as receiver, against Andrew Grinnan for the sum of $20,972.42, with interest thereon, &c., being the amount adjudged by this court to be in the hands of said Grinnan belonging to the trust fund created by the deed of trust executed by Wm. K. Smith to said Grinnan, and that said receiver was prosecuting said judgment against the property standing in the name of said Grinnan in said county of Madison so as to subject the same to sale, and all said property was encumbered by liens upon the same prior to that of said judgment, and that the sum of $— was due from said receiver to the clerk and sheriff of said circuit court for services rendered in said proceedings in that court; and these causes coming on this day to be further heard on the papers formerly read and upon the said report of A. F. Matthews, receiver, and upon the report made by Commissioner John
116 A. Preston as to the matters referred to him by the decree entered in these causes on the 10 day of ——, and upon the exceptions taken to said report by Francis B. Chewning concerning the claims against the trust fund allowed in said report of Samuel Price for five hundred dollars for professional services alleged by him as rendered to Andrew G. Grinnan, trustee in these causes, and in the court of appeals of West Virginia, and were argued by counsel. Upon consideration whereof the court doth sustain the said exceptions and decide that the said claim of said Samuel Price is not a valid one against the trust subject in these causes, and the court, approving in all of the respects the said report of Commissioner Preston, doth confirm the same.

And the court being of opinion that there is no liability against said trust fund because of the alleged deficiency of acreage in the Forest Hill tract sold and conveyed by Andrew G. Grinnan, trustee, nor any liability because of the alleged failure on the part of the owners of said Forest Hill tract to have a right of way therefrom over the Elk Ridge tract, and the court being further of opinion that
117 A. N. Tift, surving partner of Corless & Co., the assignees of Bacon, Dodge & Co., has no claim against the trust subject, and that A. H. H. Stuart and —— Johnson, as administrators of —— Boyd, *has* no claim against the trust subject, and that Andrew G. Grinnan, in his own right & as trustee of W. K. Smith and as trustee of Abigail H. Smith, has no claim against the trust subject over and beyond what has been allowed and reported in the accounts of his transactions as trustee of William K. Smith, which has been settled, stated, & reported in these causes by Commissioner John A. Preston, the court doth accordingly decide and decree.

And upon motion of Andrew G. Grinnan leave is granted him to resign the office and duties of trustee under the deed of October 29th, 1857, and the deed of trust of Feb'y 10th, 1859, executed to him by Wm. K. Smith relating to the trust properties mentioned in the bill and proceedings.

And the court doth further adjudge, order, and decree that John W. Harris, who is hereby appointed a special commissioner for that purpose, do sell at public auction or at private sale, as he may deem most advisable for the purpose of obtaining the highest prices therefor, the following parcels of real property, lying in Fayette county, which remain unsold, of the trust properties conveyed in trust by
118 Wm. K. Smith to Andrew G. Grinnan by his deeds of October 29th, 1857, and Feb'y 10th, 1859, consisting of an undivided half of the tract called in the proceedings in these causes "the Huddleston tract," estimated to contain 125 acres, and the agricultural rights which remain unsold in several small parcels of land of the tract known as the Wilson survey, which were reserved from sale in the sale made by A. G. Grinnan of the Wilson survey lands to Long & Norris.

And it being admitted by the parties that the rents and profits of the other half of said Huddleston tract will not pay the debt decreed against said Grinnan within five years the said commissioner is further directed to sell at public or private sale the said other one undivided half of said Huddleston tract, which half was conveyed by W. K. Smith to A. G. Grinnan, and said sales shall be made upon the following terms: Cash enough in hand to defray the expenses of said sale and the residue upon a credit of one and two years, with interest from day of sale, taking from the purchaser bonds with approved security for the deferred payments and retaining the title as ultimate security, or said comm'r may in his discretion require one-
119 third of the purchase-money to be paid in cash and dispense with any security for the deferred payments than that provided by the bonds of the purchaser and the retention of the title to the land; but before making any public sale said commissioner shall advertise the time, place, and terms thereof for four

successive weeks in some newspaper published in Greenbrier Co. and in another published in the county of Kanawha and in such other manner as he may deem expedient.

And the said commissioner is directed to report all sales made by him under the decree to this court for its approval, and he shall not collect any of the proceeds of such sales until he shall have entered into bond before the clerk of this court, with security approved by said clerk, in the penalty of $10,000.00, conditioned according to law in such cases.

WEST VIRGINIA:

And at another day, to wit, at a circuit court held for Greenbrier county, at the court-house thereof, on the 27th day of April, 1883.

A. G. GRINNAN
vs.
S. C. LONG *et al.*

and

F. B. CHEWNING
vs.
J. F. COWAN *et al.*

120 John W. Harris, the special commissioner appointed (by the last decree in these causes) to sell the tract of land in Fayette county in said decree mentioned as the Huddleston tract and locally known as the Grinnan tract, this day made his report of his actings under said decree, by which report it appears that said commissioner exposed said tract to sale at public auction at Kanawha Falls, near the premises, on the 12th day of April, 1883, after having given one month's previous notice of the time, place, and terms of sales by advertisements thereof in the Greenbrier Independent and the Kanawha Gazette, and that at said offering of sale there were several bidders for said land, and that said land was cried out to William Wyant, he being the highest bidder therefor, at the price of sixty dollars and 50 cents per acre; which bid, there being one hundred and fifty-four acres and $\frac{1}{8}$ of an acre in said tract (exclusive of the parcel of nine $\frac{74}{160}$ acres adjacent to said tract & hereinafter referred to), made the sum of nine thousand dollars and three hundred and twenty-four $\frac{56}{100}$ dollars, and that said William Wyant had complied with the terms of said sale by paying to said commissioner on the day of
121 sale the sum of $453.22, and subsequently the sum of $2,654.96, making the sum of thirty-one hundred and eight $\frac{18}{100}$ dollars, and had executed to said commissioner his two bonds which, as credited by certain payments made thereon, reduced them to the sum of $3,108.19 each, which is the amount for which they should have been drawn if said Wyant had, on the day of sale, paid the full amount of cash, being one-third, which was paid in the two instalments of $453.22 and $2,654.96 above mentioned,

which said two bonds bear date April 12th, 1883, and are payable respectively twelve and twenty-four months after date, with interest from date.

And that said commissioner inasmuch as it appeared by the survey made of said tract of land by H. J. Tucker, surveyor (a map of which survey made by said surveyor is returned with said report of Commissioner Harris), that there is a parcel of land containing nine $\frac{74}{160}$ acres lying adjacent to the southerly line of said tract which was claimed by the former owners of the said Huddleston or Grinnan tract as a part thereof, and to which there is no claim set up by the owners of the land adjacent to said parcel so far
122 as said commissioner could ascertain, but which parcel of land was not covered by the liens of said Huddleston or Grinnan tract as run by said surveyor, and that for these reasons said Com'r Harris deemed it expedient to announce at said public offering of said tract of 154⅛ acres that the purchaser thereof at said sale, if confirmed by this court, should receive from said commissioner by order of the court in those causes a quitclaim to said parcel of nine $\frac{74}{160}$ acres.

And it further appearing from said report that said com'r considered said bill of said William Wyant a fair and full price for said land and recommended the confirmation of said sale—

These causes came on this day to be further heard on the papers formerly read and upon said report of sale and *was* argued by counsel. Upon consideration whereof, there being no exceptions taken to said report, the court, approving, doth confirm the same and doth confirm the said sale so made of said tract of land to the said William Wyant.

And upon the motion of Marye and Fitzhugh and John W. Harris, the counsel who have conducted these causes on
123 behalf of the creditors entitled to recover the proceeds of the sale of the property conveyed by the deed of trust made by William K. Smith to Andrew G. Grinnan (in the proceedings in these causes mentioned), the court doth allow a fee for their said services in this court (and in the matters of the appeals to the supreme court of appeals of this State taken by said Grinnan from the decrees of this court in these causes) of six hundred dollars to be paid to said counsel out of the said cash payment by said Comm'r Harris; and on the motion of said Marye & Fitzhugh and upon the affidavit this day filed by John L. Marye in regard to the professional services of said attornies in regard thereto, the court doth allow to said Marye & Fitzhugh a fee of two hundred dollars for their services in obtaining in the circuit court of Madison county, in the State of Virginia, a judgment of that court in favor of Alexander F. Matthews, receiver of this court, against said Andrew G. Grinnan in the sum of $21,613.24 and the interest thereon (decreed heretofore in these causes to be paid by said Grinnan to said receiver) and their services in further proceedings taken by them in said courts in subjecting the property of said Grinnan to sale to satisfy
124 the liens thereon so as to ascertain whether any satisfaction could be obtained for said judgment of said receiver, which

last-named fee shall be paid by said Commissioner Harris out of said cash payment in his hands.

And it appearing by a written statement marked X X, which has been made by Commissioner John A. Preston and is filed with the said report of Special Commissioner Harris, that the costs of these causes remaining unpaid, together with the costs and charges of said sale, amount to $450.59, and that the costs in said suits and proceedings in said circuit court of Madison county incurred on behalf of said receiver amounts to $77.60, and that there is due Alexander F. Matthews as receiver for his services under the decrees in these causes a fee of $25, the court doth direct and order that said Comm'r Harris do, out of said cash payments in his hands, pay the said several amounts above stated to the parties entitled thereto, the said costs in said suits in Madison circuit court to be paid by said Harris to Marye & Fitzhugh, who shall account for same to parties entitled thereto.

125 And it further appearing from said statement X X that there will remain of said cash payment, after paying thereout the sums hereinabove ordered to be paid, the nett amount of $1,754.99 in the hands of said Harris, which is distributable in ratable proportion among the creditors aforesaid decreed in said deed of trust according to the relative amounts of their respective claims as shown by said statement (which statement excludes from participation in said distribution the claims reported by Comm'r Preston as owned by said Andrew G. Grinnan, who is the assignee of said claims), and that the said nett sum of $1,754.99 for distribution will pay a percentage of 14 per cent. and .6683 of one per cent. on the said claims entitled to share ratably in said nett amount after adding to said nett amount the sum of $18,024.52 paid by A. G. Grinnan out of the trust fund on part of the claims of F. B. Chewning and Abigail H. Smith, but that the dividends so shown as coming to the claims of F. B. Chewning in his own right and adm'r will be abated by said sums so heretofore received out

126 of the trust fund upon said claims as shown by the reports of Comm'r Preston, the court doth adjudge, order, and decree that said Commissioner Harris do distribute and pay said net sum of $1,754.99 ratably among said creditors, paying to each creditor the amount stated in said statement X X as the ratable dividend of each creditor therein, the dividends coming to the claims of said F. B. Chewning in his own right and as assignee of other claims and as adm'r of A. H. Smith, dec'd, and to the claims of Sam'l Philips & Sons and George Hamilton, Jr., and of Wm. H. Fitzhugh, ex'or, and Thos. C. Catlett and Thomas Philips to be paid by said Comm'r Harris to Marye and Fitzhugh as attornies representing said claims.

And the court doth further order & direct that said Comm'r Harris do collect the said bonds given by said William Wyant for the deferred installments of said purchase-money as the same shall fall due, and he is further authorized to collect and receive any sums which may be collectible for the trust fund arising

127 from the sales made by said A. G. Grinnan of agricultural rights in the lands conveyed by said deed of trust, which ap-

pear in the proceedings in these causes, and said Harris is hereby substituted to all the authority as to these claims of the trustee, A. G. Grinnan, and is authorized at his discretion to employ an agent to act in the collection of such claims and to bring suit for the enforcement of such of said debts as are ascertained to be due or for the recovery back to the trust fund of the rights reserved in the sale of the Loup Creek tract, provided that no expense be incurred in such suits except as may be met by the recoveries effected in such suits, and the said commissioner, Harris, shall report his proceedings hereunder to this court, and upon the application of said Wm. Wyant a writ of possession shall issue, directed to the sheriff of Fayette county, to put him in possession of the land purchased by him in this cause.

128 *Report of Sale by John W. Harris, Com'r.*

To the Hon. H. A. Holt, judge of the circuit cou-t of Greenbrier county:

The undersigned, who, by a decree rendered on the 10th day of July, 1882, in the causes of A. G. Grinnan *vs.* S. C. Long *et al.* and F. B. Chewning *vs.* J. F. Cowan *et al.*, was appointed a com'r to make sale of the tract of land in the bills and proceedings in said causes mentioned as the Grinnan-Huddleston tract, begs leave to report that it became necessary, in order to sell said land to advantage, that a careful survey thereof should be made, which involved some time and expense, as well in having the land actually run & platted as in the examination of the records of Fayette county for title papers, the making of copies, &c., the matter being involved in considerable confusion. The end abundantly justified this cause, as your com'r thinks, for the survey showed the tract to contain 154⅛ acres in addition to a tract of $9\frac{74}{160}$ acres on the southern boundary, which your com'r understood was claimed by the former owners
129 as a part of the Grinnan-Huddleston tract, which is not claimed by the adjoining proprietor or any one else as far as he could understand. In view, however, of the fact that Surveyor H. J. Tucker reported to him that he could not make the calls of the Grinnan-Huddleston lands as run by him cover the said $9\frac{74}{160}$ acres your com'r did not deem it prudent to do more than sell the land as containing 154⅛ acres, announcing that a quitclaim deed would be made to the purchaser for the smaller tract. Accordingly the land was so sold on the 12th day of April, 1883, at Kanawha Falls, contiguous thereto, at public auction, your com'r having previously advertised the sale of said land, as directed by the decree aforesaid, by publication in the Kanawha Gazette and Greenbrier Independent newspapers, and Wm. Wyant, being the highest bidder for said land, became the purchaser thereof at the price of $60.50 per acre, aggregating $9,324.56, of which he has paid in cash the sum of $3,108.18 & for the balance of which your com'r holds his two bonds for $3,108.18 each, payable, respect-

ively, one and two years after date, with interest from date.
130 (NOTE.—Owing to the amount paid in cash on the day of sale ($453.22) being more by $18.00 than was intended to be required when the bonds were drawn, each for $4,444.67, a credit of $18.00 was entered upon the first of them; and said Wyant, having subsequently elected to pay one-third of the entire purchase-money cash, sent your com'r a draft for $2,654.96, which was improperly credited by said Wyant on the first bond. This credit has been erased and so proportioned as to make the bonds, as of the day of sale, $3,108.17 each, as above stated.) Your com. thinks said sale a good one and recommends its confirmation.

Your com'r returns herewith a plat of the lands aforesaid and the report made to him by Surveyor H. J. Tucker.

Your com'r also submits herewith a statement of the costs of suit and expenses of sale, amounting to $450.59.

All of which is respectfully submitted.

JOHN W. HARRIS, *Com'r.*

April 26th, 1883.

NOTE.—Since closing said report Com'r Preston has made a statement for the distribution of the above fund, at the request
131 of your com'r, and said statement, marked X X, is returned herewith.

JOHN W. HARRIS.

Surveyor's Report.

Survey of the A. G. Grinnan lands, lying in Fayette county, West Virginia, below Armstrong creek, on Kanawha river, made for Jno. W. Harris.

I began at a pine and pine stump on a ridge (see corner marked "7" on map) shown me by Wm. Jarrett as the corner of the Huddleston 200-acre tract, thence I ran by the calls of a survey made by T. S. Robson for Forest Hill M. & M. Co. (see copy marked "A") S. 32½ E. 10 poles to "2"— a stake called for was not found; N. 56° 27′ E. 126 poles to "3," a point on a north hillside—a lynn, maple, dogwood, and ironwood called for were not found, variation 1° 12′; N. 80° 12′ E. 107 poles to a pine, chestnut, and gum in a point of a ridge at "4," variation 12′ and 23 poles over the distance called for; N. 61° 12′ E. 225½ poles to "5," a point on the bank of Kanawha river, variation 1° 12′ and 18½ poles short of the distance called for.

Beginning again at "2," I ran by the calls of a deed from
132 G. P. Huddleston to A. G. Grinnan (see copy marked "B") S. 32½ E. 38½ poles to a poplar on a dividing ridge at A, variation 30′ and 10½ poles over the distance called for; thence, allowing 3° variation, I ran N. 41 E. 40 poles, N. 18 E. 10 poles, N. 71 E. 32 poles, N. 38 E. 28 poles, N. 76 E. 14 poles, S. 79 E. 88 poles, S. 57 E. 16⅔ poles. This line was about to leave the top of the ridge and I had to stop at the end of the above distance to

avoid doing so, N. 73 E. 32 poles. (I extended this line 2 over the distance called for so as to reach some marked trees and at the same time to remain on top of the ridge in the next course), N. 16 E. 30 poles, N. 53 E. 16 poles, N. 33 E. 30¾ poles. (I extended this line 2¾ poles over the distance called for the same courses as that mentioned above), S. 82 E. 52 poles, S. 47 E. 80 poles, down the mountain to "18;" thence N. 12 E. 115 poles to "19." No course trees are called for in the deed of Huddleston to Grinnan at "19," but in the deed of Brannen to Edwards (see copy m'k'd "C") a sugar tree, beech, and buckeye were called for at or near that point, but they were not found; thence with the calls of deed Brannen to Wm. W. Edwards S. 77 E. 30½ poles to a beech on the bank of
133 Kanawha river at "20," corner to a tract of 57 acres granted to Geo. Richards, variation 46° and 4½ poles over the distance called for. The corner- "N" and O being gone, I know of no method of fixing the point at "19," called for by Brannen, except the one I have adopted—that is, to do so by the Grinnan calls. If the corner "19" is the true corner of the Brannen 15-acre tract the Brannen call, "N. 57 E. 26 poles," cannot reach the beech at "20," which is the corner of the Richards 57 acres. The words "and with" preceding the call "N. 57 E." seem to indicate that the beech must have been a corner of both the 57 acres and the Brannen 15-a. tract. In addition to this the beech at "20" is generally regarded as a corner of Grinnan's by those who ought to know, according to the best information that I can get. Said beech is defaced to such a degree that I cannot distinguish corner marks on it. The next call of the Brannen 15-acre lot is "same line to low-water mark in the said Great Kanawha river." But in the original survey of the Brannen 32½ acres the next call from the beech was "N. 3 W." I al-
134 lowed 3° variation and ran north 8 poles to the edge of Kanawha river (see corner 21); thence N. 35 W. 64 poles to "5." I then began at the beech at "20" and, reversing on the calls of deed Jas. Montgomery, ex., to Wm. Bustee (see copy "D"), I ran S. 35 W. 31 poles to a large sugar tree and sugar-tree stump on the hillside at "M," variation 3° and 3 poles short of the distance called for; thence reversing on the last call of said deed S. 25 W. 88 poles to "18," variation 1°. The entire call or distance was not run out. The Bustee calls (see copy m'k'd "E"), by allowing 3° variation, run with the red lines from the poplar at "A" to a large double chestnut that answered the description given in the notes at "B." The last line, however, or the line J B would run N. 46 E. 50 poles instead of N. 44 E. 52 poles. From "B" I mapped the lines to K & L without running.

The Brannen 15 acres is embraced within the lines beginning at O, thence to "N" and to "19," "20," "21," and down and with the river to about the point "P" and back to "O." It appears that its corner trees are all gone; therefore it would be difficult to define its true limits. I do not believe, however, that it contained
135 as much as 15 acres.

H. J. TUCKER, *Surveyor.*

EXHIBITS "A," "B," "C," "D," & "E" OF REPORT.

EXHIBIT "A."

Copy of Robson Survey Made for Forest Hill M. & M. Co.

Beginning at a sycamore opposite the head of Wheeler's island S. 55¼ W. 460 poles to two pines on a ridge S. 33 E. 10 poles to a stake N. 55¼ E. 126 poles to a lynn maple dogwood and ironwood on a north hillside, N. 80 E. 84 poles to a pine, gum and chestnut on a point of a ridge N. 60 E. 244 poles to a beech on the bank of the river N. 35 W. 70 poles down and with the river to the beginning containing 105 acres.

Oct'r 14th 1859.

EXHIBIT "B."

G. P. Huddleston to A. G. Grinnan. } Deed. Book E, page 452.

Conveys 200 acres of land lying below the mouth of Armstrong creek bounded as follows:

136 Beginning at a sycamore opposite the head of Wheeler's island and running S. 55¼ W. 460 poles to two pines on a ridge corner to Paxton thence S. 33 E. 38 poles to a poplar on a dividing ridge corner to Bustee's heirs' land thence with the top of said ridge and Bustee's lines N. 38 E. 40 poles N. 15 E. 10 poles N. 68 E. 32 poles N. 35 E. 28 poles N. 73 E. 14 poles S. 82 E. 88 poles S. 60 E. 23 poles N. 70 E. 30 poles, N. 13 E. 30 poles, N. 50 E. 16 poles N. 30 E. 28 poles S. 85 E. 52 poles S. 50 E. 80 poles N. 9 E. 115 poles N. 28 W. 85 poles to a lynn corner thence N. 10 E. 11 poles to a beech on Kanawha river thence down said river N. 35 W. 36 poles to beginning.

EXHIBIT "C."

L. H. Brannon to Wm. W. Edwards. } Deed. Book D, page 448.

Conveys 15 acres more or less of land bounded as follows: Beginning at a large beech on the south bank of the Great Kanawha river on a line of the G. Richards survey and with the same S. 6 W. 12 poles to two white lynns corner to Richards' and Gallatins' surveys thence with the latter S. 31° E. 84 poles to a sugar tree beech and

137 buckeye on a line of a survey made for Richards and with N. 57 E. 26 poles to an ash and beech on the bank of the river thence on the same line to low-water mark in the said Great Kanawha river, thence down and along the same at low-water mark to a point opposite the place of beginning thence S. 6 W. up the

south bank to the place of beginning containing 15 acres be the same more or less.
June 9th 1853.

The above tract conveyed by Wm. H. Edwards to W. K. Smith 7th Octo. 1857 and said deed refers to a deed conveying said land by Wm. W. Edwards to W. H. Edwards on 24th Octo. 1853. See Book E page 88. W. K. Smith conveyed the above 15 acres to A. G. Grinnan Octo. 29th 1857. See Book — page 84.

EXHIBIT "D."

Jas. Montgomery, ex., to Wm. Bustee. } Deed. Book D, page 101.

Conveys 57 acres which was granted to Geo. Richards March 14th 1825 and bounded as follows Beginning at two large sugar trees on the hillside below Armstrong creek N. 32 E. 34 poles
138 to a beech and hornbeam trees on the bank of Kanawha river thence up the same S. 43 E. 54 poles crossing Armstrong creek to a double sycamore between the river and the creek corner to 250 acres thence with lines of same * * * N. 45 W. 24 poles to two white oaks on a hillside thence N. 24 E. 176 poles to beginning
March 31st 1859

EXHIBIT "E."

Partition of Bustee lands by Loomis Book "D" 608.— * * * The Buscan survey begins at a beech supposed to be the corner of the Gallatin survey and marked by Gen'l Beckley as such N. 49½ W. 360 poles to a poplar chestnut and chestnut oak on the top of the mountain then with the top of the mountain N. 20 E. 12 poles N. 41 E. 40 poles N. 70 E. 26 poles N. 39 E. 38 poles, S. 77 E. 32 poles, S. 86 E. 90 poles, N. 73 E. 20 poles, N. 10 E. 32 poles N. 41 E. 52 poles to a large chestnut & double chestnut on the top of the mountain commanding a view of the river above and below, (see corner marked B on red lines Tucker) S. 58 E. 74 poles to chestnut & chest. oak S. 16 E. 12 poles S. 58 E. 110 poles to walnut * * *

139 The above notes are taken from a survey made in partitioning the Buster land by Surveyor Loomis in March and April, 1852.

H. J. TUCKER.

Commissioner's Sale of Valuable Coal Land.

Pursuant to a decree of the circuit court of Greenbrier county, rendered on the 19th day of July, 1882, in the causes of A. G. Grinnan *vs.* S. C. Long *et al.* and F. B. Chewning *vs.* J. F. Cowan *et al.*, the undersigned, as special commissioner of said court in said causes,

will offer for sale, at public auction, in front of the hotel, at Kanawha Falls, on Thursday, the 12th day of April, 1883, a tract of valuable coal land situated in Fayette county, just below Armstrong creek, fronting on Kanawha river, and adjoining the lands of Buster and the Forest Hill M. & M. Co., containing, by recent survey, 154⅛ acres, being the tract locally known as the Grinnan land. A plat of said land will be exhibited on the day of sale and is now subject to examination.

140 *Terms of Sale.*

Cash enough to defray the expenses of sale, and as to the residue of the purchase-money a credit of one and two years in equal instalments, the purchaser giving bonds, bearing interest from the day of sale, with approved security, for said deferred payments; or on the payment in cash of one-third of the purchase-money the security aforesaid may be dispensed with, but in either case the title will be retained as additional security.

JOHN W. HARRIS,
Commissioner.

I, Jonathan Mays, clerk of the court aforesaid, do certify that said commissioner has given bond as required by law.

JONATHAN MAYS.

And at another day, to wit, at a circuit court held for Greenbrier county, at the court-house thereof, on the 1st day of Nov, 1880.

A. G. GRINNAN
vs.
S. C. LONG *et al.*

and

TUNNING
vs.
COWAN *et al.*

141 Upon the motion of the plaintiff in the first of these causes these two causes are continued until the next term, and upon the further motion of said plaintiff the report and amended report of Com'r John A. Preston, Esq., are recommitted to him, with directions to hear further proof in the causes as regards the debts heretofore presented or such as may be hereafter presented and to indicate in his said report the priorities of all the debts which have been heretofore produced or which shall be hereafter produced and upon what fund such priorities attach.

He shall also hear such proof as the parties may produce in regard to what is called the "right of way" in the Elk Ridge tract of land—whether the same is a superficial or horizontal right of way and how such right of way may affect the owners of the lands over

or through which the road may or will pass and to what amount they will or may be damaged thereby.

He shall also a-certain and report the damage, if any,
142 which the said plaintiff, Grinnan, may or has sustained by reason of his warranty in the deed of the said plaintiff to John Halsted and the amount which the said plaintiff may be entitled to recover against the estate of the said William K. Smith, dec'd, on account of the breach of said warranty, if such breach shall occur.

* * * * * * *

STATE OF WEST VIRGINIA, }
Greenbrier County, } *ss:*

I, Jonathan Mays, clerk of the circuit court of the county and State aforesaid, do certify that the foregoing are true transcripts of the papers, decrees, & map filed in the suit of A. G. Grinnan *vs.* S. C. Long & *als.* and Chewning *vs.* Cowan & others.

J. MAYS, *Cl'k.*

(Fee for copy & map, $15.90.)

The following is a copy of the map referred to in the foregoing record:

(Here follows diagram marked p. 142*a*.)

143 And at another day, to wit:

At a district court of the United States for the district of West Virginia continued and held at Charleston, in said district, on Tuesday, the 4th day of May, A. D. 1886.

A. G. GRINNAN
vs.
S. C. LONG & Others. } In Chancery.

This day came the defendants, by their counsel, and here presented to the court a duly certified copy of the records in this cause from the circuit court of Greenbrier county, West Virginia, removing said cause to this court, and in his motion it is ordered that the same be here docketted for further proceedings therein to be had.

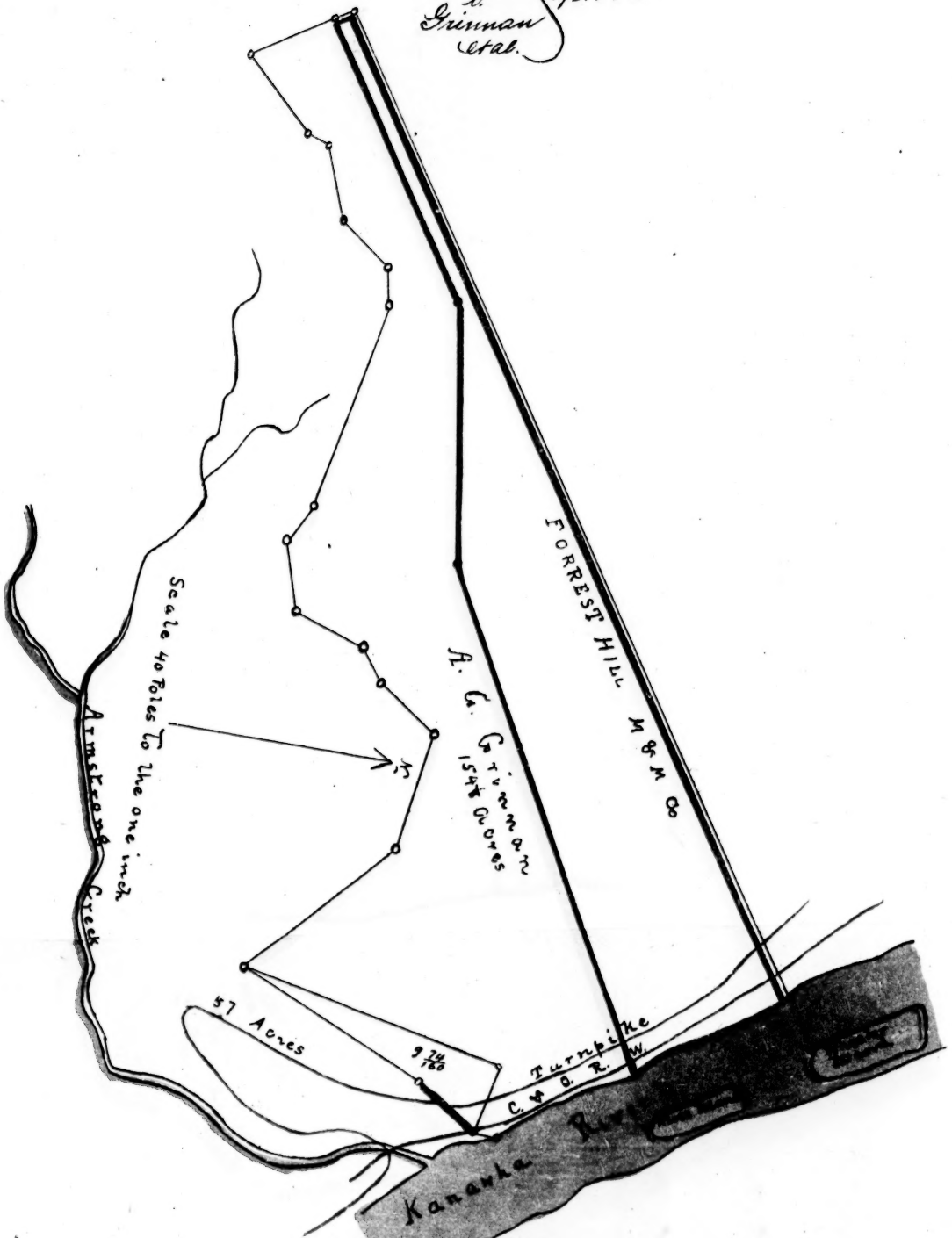
I do not find among the papers in this cause the certified copy of the record referred to in the above order, but same appears to be included in the record filed by the plaintiff John Halstead under the order next hereinafter set forth.

L. B. DELLICKER, *Clerk.*

144 And at another day, to wit:

At a district court of the United States for the district of West Virginia continued and held at Charleston, in said district, on Wednesday, the 4th day of May, A. D. 1887.

No. 370.
Halstead
v.
Grinnan
etal.
p. 142a



A. G. GRINNAN
vs.
S. C. LONG *et al.*
} In Chancery.

and

F. B. CHEWNING
vs.
J. F. COWAN *et al.*
}

This day came John Halsted, one of the defendants in the cause first above described, by his attorney, A. Burlew, Esq., and presented to the court a copy of the record of the circuit court of Greenbrier county in pursuance of an order made in said causes by said circuit court, and moved the court that said causes be here docketed in this court, which motion is granted and said causes are ordered to be here docketed.

145 The record referred to in the foregoing order is in the words and figures following, to wit:

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WEST VIRGINIA:

Pleas before the judge of the circuit court of Greenbrier county on the 17th day of November, 1886.

At a circuit court held for Greenbrier county, at the court-house thereof, on the 1st day of November, 1886.

A. G. GRINNAN
vs.
S. C. LONG *et al.*

and

F. B. CHEWNING
vs.
J. F. COWAN *et al.*

This day, 1st of November, the defendant John Halstead tendered his petition for a rehearing in these causes.

Petition of John Halsted.

To the hon. the circuit court of Greenbrier county, West Va.:

Your petitioner, John Halsted, respectfully represents that on the 10th day of July, 1882, — the circuit court of Greenbrier, county in the chancery causes described in the caption hereto and therein pending, in which first-mentioned cause your petitioner and others were defendants, a decree in its nature final as to your petitioner was rendered, prejudicial to the interest of your petitioner.

148

That said causes had been consolidated prior to the rendition of the said decree, and your petitioner had not and has not been made a party to the last-mentioned cause described in the caption hereto; that on the 27th day of April, 1883, the said circuit court made a further decree in said causes, in its nature also final and alike prejudicial to the interest of your petitioner; that your petitioner was never served with process in either of said causes and did not appear in either of them in any way, and the said two decrees and all the proceedings in the said causes, so far as they affect the rights of your petitioner, are bad, and were made in an order of publication sued out against your petitioner in the said suit of A. G. Grinnan *vs.* S. C. Long & others.

That five years have not elapsed since the rendition of the said first-mentioned decree on the 10th day of July, 1882, and that your petitioner has never been served with a copy of either of said decrees.

Your petitioner therefore prays that the said suits in chancery and the proceedings had therein, including the said two decrees

above named, may be reheard in pursuance of the statute in
149 such cases made and provided; and as in duty bound your petitioner will ever pray, &c.

JOHN HALSTED.

A. BURLEW,
Sol. for Petitioner.

Answer of John Halsted.

The separate answer of John Halsted to the bill of complaint of A. G. Grinnan against Sydney C. Long and others, now pending in the circuit court of Greenbrier county and consolidated with the suit of F. B. Chewning against J. F. Cowan and others.

To the Honorable Homer A. Holt, judge of said court, sitting in equity:

Your respondent, John Halsted, for answer to so much of the said bill of complaint of A. G. Grinnan against Sydney C. Long & others mentioned in the caption and pending in the circuit court of Greenbrier county as he is advised it is material for him to make answer to, says he believes the complainant sets out correctly the various conveyances mentioned in his said bill. It is true, as stated in said bill, that on the first day of August, 1853, Wm. H. Edwards conveyed to Wm. K. Smith 7,000 acres of land lying on Armstrong creek, in Fayette county, Virginia, now West Virginia, known as the "Elk Ridge tract." This tract of land embraces within its boundaries what is known as the Forest Hill tract, supposed
150 to contain 2,000 acres, now owned by your respondent, as hereinafter set forth.

It is true, also, as stated in said bill, that on October 1st, 1857, Wm. K. Smith and wife conveyed to the complainant, A. G. Grinnan, with covenants of general warranty, one undivided half of the said Forest Hill tract, lying in Fayette county, Virginia, near the waters of Armstrong creek, "being that part of the said tract of seven thousand acres conveyed by Wm. H. Edwards and wife to said Wm. K. Smith which will include one-half of the frontage of said tract (Elk Ridge tract) towards the Kanawha river and extending thence back through the middle of the tract," &c., together with the undivided one-half two hundred acres lying between the said tract of 7,000 acres and the Kanawha river, known as the "Huddleston tract." By this deed of conveyance the said Smith is granted an interest also in the remaining 5,000 acres of the said 7,000-acre tract. The attention of the court is especially called to "Exhibit C C" (see printed Record, page 79), filed with the complainants' bill, and which your respondent prays may be read and considered as a part of this answer.

It is also true that on the 29th day of October, 1857, Wm. K. Smith conveyed to A. G. Grinnan by deed absolute the several tracts of land, as stated in the complainants' bill, including the interest of said Smith in the said 7,000 acres, "also the remaining half of 200

acres of land on the Kanawha below Armstrong creek, being the tract contracted to be conveyed to said Edwards for the benefit of said Smith by George Huddleston;" that although this deed
151 was for the lands in fee simple there was a secret trust concerning it as stated in said bill.

In this deed it will appear that Smith conveyed to said Grinnan "the remaining half of a tract of about 200 acres lying on the Kanawha river below Armstrong creek." In other words, the remaining half of the said Huddleston tract. (See copy of deed, herewith filed & made a part of this answer, marked "Ex. A.") It will appear by the said bill, and it is true, that prior to the sale of the said 7,000-acre tract by Wm. H. Edwards to Wm. K. Smith that said Edwards had made a written contract with George B. Huddleston for the purchase of the "Huddleston tract of 200 acres," for the benefit of said Smith, as an outlet for the said 7,000 acres to the Great Kanawha river, as the said 7,000 acres only came within about three-quarters of a mile of said river.

The said contract between the said Edwards and Smith was entered into on the — day of ——, and was recorded in Fayette county, Virginia, which county was in that part of the State of Virginia which is now known as the State of West Virginia; a copy of which contract is herewith filed and made a part of this answer, marked "Ex. A No. 2."

That on the 15th day of June, 1859, Wm. K. Smith and wife, A. G. Grinnan and wife, and A. G. Grinnan, trustee, conveyed the said Forest Hill tract to the Forest Hill Mining and Manufacturing Company, a corporation regularly created, &c., being part of the
152 said 7,000 acres as aforesaid; "also a certain piece or parcel of a tract of land known as the 'Huddleston tract' (being the same Huddleston tract hereinbefore referred to), to be surveyed off the western side of said tract by a line running from the northerly to the southerly side of said tract, to be bounded on the south by the tract herein surveyed (Forest Hill tract) and on the north by the Great Kanawha river and containing one hundred acres, more or less." By this deed it was intended to divide the "Huddleston tract" in equal parts so as to give the western half of same to the Forest Hill Company and thus give an outlet for the Forest Hill tract to the Kanawha river. The tract of "200 acres"—Huddleston tract—had been recognized by the owner and purchaser as a tract containing 200 acres, and it was purchased by halves by the said Smith, as herembefore shown. The deed to the Forest Hill Mining and Manufacturing Company above referred to calls for the tract to be so divided that the southern boundary of the Huddleston tract shall bound on the northerly boundary of the Forest Hill tract; a certified copy of which deed is herewith filed and made a part of this answer, marked "Ex. B."

This deed was regularly recorded in Fayette county, Virginia (and West Virginia), on the — day of ——.

That on the 27th day of October, 1860, George P. Huddle-
153 ston executed and delivered to A. G. Grinnan a deed of conveyance for the said "Huddleston tract" of 200 acres in

accordance with the aforesaid contract made between Wm. H. Edwards and Wm. K. Smith for the purchase of said land.

This deed was admitted to record in the said county of Fayette on the — day of October, 1860; a certified copy of which deed is herewith filed and made a part of this answer, marked " Ex. C."

That on the 15th day of June, 1859, the Forest Hill Mining & Manufacturing Company executed a deed of trust to Robert Soutter, trustee, for the same lands embraced in said deed from Grinnan and wife, Grinnan, trustee, and Wm. K. Smith and wife to the Forest Hill Mining and Manufacturing Company; which deed was admitted to record in the said county of Fayette on the 27th day of June, 1859; a certified copy of which deed is herewith filed and made a part of this answer, marked Ex. D.

That on the 6th day of June, 1864, the said Robert Soutter, trustee, executed and delivered to your respondent a deed for the same lands embraced in the deed last above mentioned, to wit, the Forest Hill tract, and one hundred acres, more or less, to be surveyed off the western part of said Huddleston tract, as hereinbefore stated, supposed to contain 200 acres.

154 A certified copy of which deed is herewith filed and made a part of this answer, marked Ex. E.

That since the purchase of said Forest Hill tract and the western part of said Huddleston tract, as herein stated, the said land has been occupied by said Forest Hill Co. and by your respondent consecutively, continuously, & notoriously, claiming as his own, in accordance with their respective deeds, by actual possession of said land, and your respondent now holds actual possession of the same.

The Huddleston tract was partly laid off, in accordance with the deed from Smith and Grinnan to the Forest Hill Company, shortly before the war—that is, the dividing line from the Kanawha river was run some distance back for the purpose of ascertaining the line sufficiently to locate the company's buildings on that part of the land lying on the Kanawha river, but the dividing line was never actually or entirely run out, so that in fact the " 100 acres, more or less," purchased by said company is still undivided by actual survey.

It will appear, therefore, that Wm. Wyants had constructive notice at least that in the year — Wm. H. Edwards entered into a contract with George B. Huddleston for the benefit of Wm.

155 K. Smith for the purchase of the Huddleston tract.

That said Wyants had also constructive notice at the time he purchased the land in controversy that in accordance with said contract Wm. K. Smith, on the 1st day of October, 1857, conveyed, among other lands, one-half of the Forest Hill tract and the undivided half of the Huddleston tract to A. G. Grinnan.

That said Wyants had also constructive notice that on the 29th day of October, 1857, said Smith conveyed to said Grinnan by deed, among other lands, the remaining half of 200 acres of land, &c., being the remaining half of the Huddleston tract.

He had actual knowledge of all the conveyances referred to in this answer and of the location of the lands therein conveyed with

reference to each other, including the written contract made between Wm. H. Edwards and George P. Huddleston for the purchase of the "Huddleston tract of 200 acres" for the benefit of Wm. K. Smith as an outlet for the said 7,000 acres of land, for all these conveyances, contract-, &c., were fully set out in the record of the causes, and when Wm. Wyants became the purchaser of the land in controversy under the decree made in said causes and thereby became a *quasi* party to said causes the law forced upon him knowledge of what the record of the causes *entered*, and particularly so in
156 regard to the pleadings of the causes, and he will not be permitted to evade such knowledge by a denial that he was ignorant of what the record contained.

Yet, notwithstanding this knowledge, the said Wyant claims to be the purchaser under a decree made in these causes of that part of the Huddleston tract which was not sold and conveyed by said Grinnan and others to the Forest Hill Mining & Manufacturing Company, so laid off under a survey made in some way in these causes as to entirely separate or practically so that part of the Huddleston tract purchased by said Forest Hill Mining & Manufacturing Co. from the said Forest Hill tract, for which tract the said Huddleston tract was purchased to give an outlet to the Great Kanawha river, as hereinbefore stated; but said Wyants has only procured an equitable title for said land and has paid but part of the purchase-money therefor.

Your respondent says that if said purchase by Wm. Wyants be permitted to stand against respondent it will be in violation of your respondent's rights in the matter, will subvert the object for which the said "Huddleston" land was purchased originally by the Forest Hill Mining & Manufacturing Company and will incalculably damage your *your* respondent by very greatly destroying the
157 value of the Forest Hill tract.

Your respondent is advised and so charges that Wm. Wyants cannot hold that strip of the Huddleston tract against your respondent which lies between that part of the Huddleston tract and the Forest Hill tract purchased by the Forest Hill Mining & Manufacturing Co. and your respondent, as herein stated, because he had both actual and constructive notice of the sale and conveyance of said land to said company and subsequently to your respondent.

Second. Because he is not a *bona fide* purchaser without notice, he has not the legal title to the land, nor has he paid the purchase-money therefor.

Third. Because he purchased from one (Grinnan) who had notice of respondent's title to the land and respondent was in possession of the land, which was notice sufficient to put the purchaser on enquiry.

Fourth. Grinnan did not have possession of the land in question at the time of the sale to Wyants, and even if it should turn out, which respondent does not believe it will, that a third party was in possession of the land in question at the time of the sale Wyant can-

not claim to be a *bona fide* purchaser without notice, for possession in another is sufficient to put the party on enquiry.

158 Therefore your respondent prays that the said sale of the land in question to Wm. Wyants, so far as it affects your respondent's rights therein, be set aside and held for naught, and that the complainants be compelled to lay off the said Huddleston tract according to justice and equity, and the calls of the deed from A. G. Grinnan and others to the said Forest Hill Mining and Manufacturing Company, and when this shall be done your respondent prays to be dismissed with his costs, &c.

JOHN HALSTEAD.

A. BURLEW & J. W. DAVIS, *Sol's.*

STATE OF WEST VIRGINIA, *Greenbrier County,* } *To wit:*

John Halstead, the defendant named in the foregoing answer, being duly sworn, says that the facts and allegations therein contained are true except so far as they are therein stated to be on information, and that so far as they are therein stated to be upon information he believes them to be true.

JOHN HALSTEAD.

Taken, sworn to, and subscribed before me this 3rd day of November, 1886.

J. MAYS,
Cl'k C't C't G'b'r Co., W. Va.

159 "EX. A" OF HALSTEAD'S ANSWER.

Smith to Grinnan.

This indenture made this 29th day of October in the year eighteen hundred and fifty-seven between Wm. King Smith of Fredericksburg, Virginia of the one part and A. G. Grinnan of the other part, witnesseth, that for the sum of one dollar and for other valuable consideration the party of the first part does grant and convey with general warranty, unto the party of the second part, the following property to wit the real estate of said Smith in the county of Fayette, Virginia, including a tract of forty thousand acres more or less conveyed to said Smith by Wm. H. Edwards on December 2nd, 1852, also the interest of said Smith in a tract of 7,000 acres more or less on the west side of Armstrong's creek, conveyed to said Smith by said *by said* Edwards on the 1st of August, 1853, also the remaining half of a tract of about two hundred acres lying on the Kanawha below Armstrong's creek being the tract contracted to be conveyed — said Edwards for said Smith's benefit by George Huddleston, also a tract of about fifteen acres patented L. H. Brum

on the 11th of November 1834 and conveyed to said Smith by said Edwards on the 7th of October 1857.

Witness the following signatures and seals.

W. K. SMITH. [SEAL.]
——— ———. [SEAL.]

160 STATE OF VIRGINIA, } *To wit:*
City of Richmond, }

I, James Pleasants, a notary public for the said city, in the State of Virginia, do certify that W. K. Smith, whose name is signed to the writing above, bearing date on the 29 day of Oct., 1857, has acknowledged the same before me in my corporation. Given under my hand this 29th Oct., 1857.

JAMES PLEASANTS, *Not. Pub.*

FAYETTE COUNTY COURT,
CLERK'S OFFICE, *November 14th*, 1857.

The foregoing deed, with the certificate of acknowledgment thereto annexed, was presented in said office and is admitted to record.

Teste: J. B. JONES, *Cl'k.*

A copy.
Teste: M. F. DAVIS, *Clerk*,
By G. W. MILLER, *Dep.*

EX. A No. 2 OF ANSWER.

This exhibit is not filed in the papers of these causes (Grinnan *vs.* Long *et al.* and Chewning *vs.* Cowan *et als.*).

J. MAYS, *Cl'k.*

161 EX. B OF ANSWER.

Copy.

This indenture made the fifteenth day of June in the year of our Lord one thousand eight hundred and fifty-nine between Wm. K. Smith and Abigail H. his wife and Andrew Glassel Grinnan and Georgia B. his wife, all of Fredericksburg in the State of Virginia and the said Andrew Glassel Grinnan trustee (under and by virtue of a deed from said William K. Smith to him dated Oct. 29th 1857 and articles of agreement between said Smith and said Grinnan made the tenth day February 1859 referring to said deed as by reference to said deed and agreement both duly recorded in Fayette county Virginia will more fully and at large appear) parties of the first part and the Forest Hill Mining and Manufacturing Company a corporation chartered by the legislature of the State of Virginia of the second part witnesseth; that the said parties of the first part for and in consideration of the sum of one dollar lawful money of the United States of America and for other good and valuable con-

siderations unto them well and truly paid by the said party of the second part at and before the sealing and delivery of these presents the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened enfeoffed released and confirmed and by these presents do grant, bargain, sell, alien, enfeoff release and confirm unto the said party of the second part, their successors and assigns,
162 all that certain tract piece or parcel of land situate, lying and being in the county of Fayette and State of Virginia, bounded and described as follows—to wit Beginning at a point marked "A" in the middle of the northern line of the old Forest Hill tract thence N. 23 W. 193 perches to two chestnut oaks on a ridge between Armstrong and Morris creeks and corner of the lands of Paint Creek Company, thence along the top of said ridge S. 87° W. 40 poles to two chestnuts, S. 59 W. 42 poles to a *to a* white oak, S. 32° W. 54 poles to a chestnut south 12° west 61 poles to a black oak, S. 60° W. 32 poles to a white oak, S. 26 W. 34 poles to two chestnut oaks, S. 48 west 23½ poles to a chestnut, S. 64 W. 53 poles to a dogwood, S. 11 W. 26 poles to a white oak, S. 51 W. 106 poles to a gum, S. 10 W. 18 poles to a chestnut, S. 44 W. 21½ poles to a stake, S. 75° W. 45 poles to a hickory, S. 45 W. 26 poles to a small locust, S. 15 W. 24 poles to a chestnut oak, S. 42 poles to a chestnut oak, S. 28° E. 90 poles to a black oak, S. 84 W. 18 poles to a stake, S. 60 W. 41 poles to a chestnut, S. 65 W. 44 poles to a black oak, N. 83 W. 36 poles to a chestnut, S. 43 W. 82 poles, N. 87 W. 28 perches to three chestnuts, N. 82 W. 60 poles to a black oak, S. 50 W. 20 poles to a white oak, S. 12 W. 20 poles to a stake, S. 5 W. 41 poles to a white oak, N. 86 W. 32½ poles to a chestnut, S. 35 W. 59 poles to a chestnut oak, at the head of Morris creek, thence along the ridge between Paint and Armstrong creeks S. 30° W. 69 poles to a chestnut, S. 55° E. 24 poles to a chestnut oak, N. 80 E. 25 poles to two chestnut oaks, S. 65 E. 25 poles to a pine, N. 80 E. 56 poles to a white oak, S. 16 E. 102 poles to a chestnut oak, S. 20 W. 48 poles to a chestnut, S. 45 W. 80 poles to a chestnut, S. 33 E. 32 poles to a chestnut oak, S. 20
163 W. 77 perches to a chestnut oak and pine, S. 16 E. 50 poles to a chestnut, S. 5 W. 47 poles to a chestnut oak, at the head of Ash Camp branch, S. 50 E. 66 poles to a chestnut oak, N. 67 E. 24 poles to a chestnut, S. 87 E. 34 poles to a chestnut, S. 67 E. 24 pls. to a chestnut, S. 2 W. 34½ poles to a chestnut oak, S. 14 W. 44 poles, S. 23 E. 41 poles to a chestnut, north 84 E. 185 poles, thence N. 6 W. 450 poles, thence N. 31 E. 900 poles to the beginning, containing two thousand acres more or less and being the same tract of land which William Henry Edwards and Catherine C. his wife by their several deeds dated respectively —— conveyed to the said William K. Smith and Andrew G. Grinnan in fee simple, as in and by said indentures recorded in Fayette county, aforesaid, relation being thereunto had will more fully and at large appear. Also a certain piece or parcel of a certain tract of land known as the Huddleston tract to be surveyed off the western side of said tract by a line running from northerly to southerly side of said tract to be bounded on the south by the tract hereinabove conveyed and on the north by the Great Kanawha river and containing one hundred acres more

or less. Also the perpetual right of way to the said party of the second part their successors and assigns through a tract of land known as the "Elk Ridge" tract lying between the tract of 2,000 acres hereinabove conveyed, and Armstrong's creek, with the privilege to the said party of the second party, of entering thereupon by their agents and servants, and constructing upon and over the same such roads or railroads, as they may deem necessary for convenient access to and from the lands hereby conveyed. Together
164 with all and singular the improvements, ways, waters, watercourses, rights, liberties, privileges, hereditaments, dower and right of dower, and appurtenances whatsoever thereunto belonging or in anywise appertaining, and the reversions and remainders, rents issues and profits thereof and all the estate, right, title, interest, property claim and demand whatsoever of the said parties of the first part in law, equity or otherwise howsoever, of, in, and to the same and every part thereof. To have and to hold the said premises hereby granted or mentioned and intended so to be, with the appurtenances unto the said party of the second part its successors and assigns to and for the only proper use and behoof of the said party of the second part its successors and assigns forever.

And the said William K. Smith and Andrew G. Grinnan severally but not jointly and each for himself his heirs executors and administrators do by these presents covenant grant and agree to and with the said party of the second part its successors and assigns that they the said William K. Smith and Andrew G. Grinnan and their heirs all and singular the hereditaments and premises hereby granted or mentioned or intended so to be with the appurtenances unto the said party of the second part, its successors and assigns against them the said William K. Smith and Andrew G. Grinnan and their heirs, and against all and every — or persons whomsoever, lawfully claiming or to claim the same, shall and will, severally and each for himself as aforesaid warrant and forever defend.

And said William K. Smith and Andrew G. Grinnan severally and not jointly and each for himself his heirs executors
165 and administrators do covenant and agree to and with the said party of the second part, their successors and assigns that the said William K. Smith and Andrew G. Grinnan at the time of the sealing and delivery of these presents, are lawfully seized of good, absolute and indefeasible estate of inheritance in fee simple of and in all and singular the above granted bargained and described premises with the appurtenances, and have a good right, full power, and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid.

And that the said party of the second part its successors and assigns shall and may at all times hereafter, peaceably and quietly, have, hold, use, occupy and enjoy the above-granted premises and every part and parcel thereof with the appurtenances, without any let, suit, trouble, molestation, eviction or disturbance of the said parties of the first part, their heirs or assigns or of any other person or persons lawfully claiming or to claim the same. And that the same now are free, clear discharged and unencumbered of and from all

former and other grants, titles, charges, estates, judgments, taxes, assessments, and encumberances of what nature or kind soever. And also that the said party of the first part and their heirs and all and every other person or persons, whatsoever, lawfully and equitably deriving any estate, right, title or interest, of, in or to the hereinbefore-granted premises, by, from, under or in trust for them, shall and at any time or times hereafter, upon the reasonable request and at the proper cost and charges in the law of the said party of the second part its successors and assigns make, do, and
166 execute or cause or procure to be made done or executed all and every such further and other lawful and reasonable acts, conveyances and assurances in the law for the better and more effectual testing and confirming the premises hereby intended to be granted in and to the said party of the second part, its successors and assigns forever, as by the said party of the second part its successors and assigns, or its counsel, learned in the law, shall be reasonably devised, advised or required.

And the said Andrew G. Grinnan, trustee as aforesaid doth covenant grant and agree, to and with the said party of the second part its successors and assigns, that since the creation of said trust, he has not done or caused or suffered to be done anything whereby any lien or encumbrance of any nature or kind whatsoever has been created upon the premises hereinbefore conveyed and mentioned in said trust.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above mentioned.

W. K. SMITH. [SEAL.]
A. H. SMITH. [SEAL.]
A. G. GRINNAN. [SEAL.]
GEORGIA B. GRINNAN. [SEAL.]
A. G. GRINNAN, *Trustee.* [SEAL.]

Sealed and delivered in presence of us—
J. M. McKINNEY.
—— ——.

The words "their successors and assigns" interlined in the 10th line from the top on the third page before signing; also the word "anything" above.

J. M. McKINNEY.

167 STATE OF NEW YORK, } *To wit:*
City and County of New York, }

I, John M. McKinney, a commissioner appointed by the governor of the State of Virginia for the said State of New York, certify that William K. Smith and Abigail H., his wife, and Andrew G. Grinnan and Georgia B., his wife, and the said Andrew G. Grinnan, trustee, whose names are signed to the writing above bearing date on the 15th day of June, A. D. 1859, have acknowledged the same before me in the city and State of New York aforesaid; and I do further certify that Abigail H. Smith, wife of the said Wm. K.

Smith, and Georgia B. Grinnan, wife of the said Andrew G. Grinnan, whose names are signed to the above writings as aforesaid, personally appeared before me in the city, county, and State aforesaid and, being respectively by me examined privily and apart from their said husbands and having the writing aforesaid fully explained to them, they, the said Abigail H. and Georgia B., severally acknowledged the said writing to be their act and declared that they had willingly executed the same and do not wish to retract it.

Given under my hand and official seal, at my office, in
[SEAL.] the city of New York, this 15th day of June, A. D. 1859.

JOHN M. McKINNEY,
Commissioner of Virginia.

VIRGINIA:

FAYETTE COUNTY COURT CLERK'- —, *July 7th*, 1859.

The foregoing deed, with the certificate of acknowledg-
168 ments thereto annexed, was presented in said office and is admitted to record.

Teste: J. B. JONES, *Cl'k.*

STATE OF WEST VIRGINIA, } *ss:*
County of Fayette, }

I, E. B. Hawkins, clerk of the county court of said county, the same being a court of record, do hereby certify that the foregoing is a true copy, as appears from the records in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court this 26th day of October, 1886.

[Seal Co. C't of Fayette Co., West Va.]

E. B. HAWKINS, *Clerk.*

EXHIBIT "C" OF ANSWER.

This deed made this 27th day of October 1860 between George P. Huddleston and Nancy M. his wife of Fayette county, Virginia of the one part and Andrew G. Grinnan in his own right and as trustee of Wm. K. Smith of the other part, witnesseth that in consideration of the sum of twenty-four hundred and seventy-six dollars paid at different times to the party of the first part by said Smith and by said Grinnan as his trustee the receipt of which is hereby fully acknowledged the said parties of the first part do grant and convey with general warranty unto the party of the second part the following tract of land lying and being in the county of Fayette, State of

Virginia on the Great Kanawha below the mouth of Arm-
169 strong's creek containing two hundred acres (200 acres) be the same more or less bounded as follows: Beginning at a sycamore opposite the head of Wheeler's island and running S. 55¼° W. 460 poles to two pines on a ridge corner to Paxton thence S. 33 E. 38 poles to a poplar on a dividing ridge corner to Buster's heirs' land thence with the top of the said ridge & Buster's lines N. 38 E. 40 poles, N. 15 E. 10 poles, N. 68 E. 32 poles, N. 35 E. 28 poles, N.

73 E. 14 poles, S. 82 E. 88 poles, S. 60 E. 23 poles, N. 70 E. 30 poles, N. 13 E. 30 poles, N. 50 E. 16 poles, N. 30 E. 28 p'l's, S. 85 E. 52 poles, S. 50 E. 80 poles, N. 9 E. 115 poles, N. 28 W. 85 poles to a lynn corner thence N. 10 E. 11 poles to a beech on Kanawha river thence down said river N. 35 W. 36 poles to the beginning. And the said George P. Huddleston and Nancy M. his wife do covenant and agree that they will warrant generally the property hereby conveyed.

Witness the following signatures and seals.

G. P. HUDDLESTON. [SEAL.]
NANCY M. HUDDLESTON. [SEAL.]

FAYETTE COUNTY, VA., *To wit:*

This day personally appeared before *me* Henry Rigg and J. C. Huddleston, *ei* justices of said county, — do hereby certify that G. P. Huddleston & Nancy M. Huddleston, his wife, parties to the foregoing deed, this day personally appeared before us in our said county and acknowledged the same to — their act & deed; & the said Nancy M. Huddleston, being examined privaly and apart from her said husband & having said deed fully explained to her, declared she had willingly signed, *signed* seal-, and delivered the same and did not wish to retract it.

170 Given under our hands this 27th day of October, 1860.

HENRY RIGG, *J. P.*
J. C. HUDDLESTON, *J. P.*

FAYETTE COUNTY COURT CLERK'S OFFICE, *October 2nd*, 1869.

The foregoing deed, with the certificate of acknowledgement thereto annexed, was presented in said office and admitted to record.

Teste: J. B. JONES, *Cl'k.*

A copy.
Teste: M. T. DAVIS, *Clerk*,
By G. W. MILLER, *Dep.*

EXHIBIT "D" OF ANSWER.

This indenture made the fifteenth day of June in the year of our Lord one thousand eight hundred and fifty-nine between the Forest Hill Mining and Manufacturing Company a corporation chartered by the legislature of the State of Virginia of the first part and Robert Soutter of the city and State of New York of the other part trustee for the purposes hereinafter mentioned, witnesseth; that the said party of the first part for and in consideration of the sum of one dollar to them in hand paid by the said party of the second part the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, remised, released and confirmed and by these presents doth grant, bargain, sell, alien remise release and confirm unto the said party of the second part all that certain tract of land

situate in Fayette county in the State of Virginia and now
171 known as the "Forest Hill tract" containing two thousand acres more or less, also a lot piece or parcel of land containing one hundred acres to be surveyed off the west side of the tract of land known as the Huddleston tract adjoining the above. Also the right of way through and across the Elk Ridge tract, also adjoining the above, which said lands and right of way are more fully described in a deed from William K. Smith and wife, and Andrew G. Grinnan and wife, and the said Andrew G. Grinnan, trustee, to the aforesaid Forest Hill Mining and Manufacturing Company bearing even date herewith to be recorded in Fayette county aforesaid and to which deed for a more full description of said tracts of land and rights of way reference is hereby made. Together with all and singular the improvements, tenements, hereditaments and appurtenances thereunto belong- or in anywise appertaining. In trust nevertheless to secure the payment of the sums of money mentioned in the following obligations according to the tenor and effect of said obligations to wit: first sixteen promissory notes, two of Charles P. Hale, two of David G. Barnitz, two of Lewis A. Rosenmiller, two — Henry H. Eames, two of John McClelland, two of John Osborne, two of Putnam Brinkley, and two of John F. Cowan, bearing even date herewith, for the sums of 510 and 515 dollars respectively payable four and six months after date to the order of the drawer and endorsed by him, and eighty bonds of the said Forest — Mining and Manufacturing Company bearing even date herewith each for the sum of five hundred dollars with interest at the rate of six per cent. per annum with coupons thereto attached for the payment said interest semi-annually on the first day of December and June on and after the first day of December A. D. 1859,
at the banking-house of Duncan Sherman & Company in the
172 city of New York, twenty-eight of said bonds payable on the first day of June A. D. 1862, twenty-six thereof payable on the first day of June A. D. 1864, and the remaining twenty-six payable on the first day of June A. D. 1867. It being understood and agreed that if default be made in the payment of either principal or interest of said notes or bonds when due the said Robert Soutter as trustee when required so to do by the holder or holders of *of* said notes or bonds after giving public notice of the time and place of sale by publication in a daily newspaper published in the city of New York for thirty days next preceding such day of sale, shall expose the property hereinbefore conveyed to public sale at the Merchants' exchange in the city of New York and sell the same to the highest bidder for cash and shall distribute the proceeds of such sale in the manner following to wit: First to the payment of the promissory notes above recited, the twenty-eight bonds due in 1862, and the twenty-six bonds due in 1864, (or such portion thereof as may remain unpaid) *pro rata*, and after they shall be fully paid and satisfied then second, to the payment of the twenty-six bonds falling due in 1867 the surplusses of the proceeds of said sale after the payments of said notes or bonds in full if any there be, to be paid to the said parties of the first part, their successors and assigns, and it is further

understood and agreed that upon the payment of said notes and bond by the said party of the first part, this indenture shall be null and void.

In witness whereof the said Forest Hill Mining and Manufacturing Company party of the first part has caused this *obl*denture to be signed by its secretary and president and its corporate seal to be hereunto affixed this fifteenth day of June, A. D. one thousand eight hundred and fifty-nine.

CHAS. F. HALE, *President.*
DAVID G. BARNITZ, *Secretary.*

Witness present:
[SEAL.] J. M. McKENNEY.

173 STATE OF NEW YORK, *City & County of New York,* } *To wit:*

I, John M. McKenney, a commissioner appointed by the Governor of the State of Virginia for the said State of New York, certify that Charles F. Hale and David G. Barnitz, whose names are signed to the writing above, bearing date on the 15th day of June, A. D. 1859, as president & secretary of the Forest Hill Mining and Manufacturing Company, have acknowledged the same before me in the city and State of New York aforesaid.

Given under my hand & official seal this 15th day of June, A. D. 1859 (June 15th, 1859).

JOHN M. McKENNEY,
[SEAL.] *Commissioner of Virginia.*

VIRGINIA:

FAYETTE COUNTY COURT CLERK'S OFFICE, *June 27th,* 1859.

The foregoing deed *in* trust was received for record and, with the certificate of acknowledgment thereto annexed, is admitted thereto.

Teste: J. B. JONES, *Cl'k.*

STATE OF WEST VIRGINIA, *County of Fayette,* } *ss:*

I, E. B. Hawkins, clerk of the county court of said county, the same being a court of record, do hereby certify that the foregoing is a true copy as appears from the records in my office.

174 In testimony whereof I hereunto set my hand and affix the seal of said court this 26th day of October, 1886.

Seal of Cl'k.

E. B. HAWKINS, *Clerk.*

EXHIBIT "E" OF ANSWER.

This indenture made the sixth day of June in the year one thousand eight hundred and sixty-four, between Robert Soutter, trustee of the city, county and State of New York party of the first part, and John Halstead of the same city county and State party of the

second part, whereas the Forest Hill Mining and Manufacturing Company a corporation chartered by the legislature of the State of Virginia, on or about the fifteenth day of June in the year one thousand eight hundred and fifty-nine executed under its corporate seal and delivered to the party of the first part a certain deed bearing date the day last aforesaid whereby the said corporation conveyed to said party of the first part certain lands and tenements in the said State of Virginia, and described in said deed as follows, to wit: All that certain tract of land situated in Fayette county, Virginia, and now known as the Forest Hill tract containing two thousand acres more or less, also a lot piece or parcel of land containing one hundred acres to be surveyed off the west side of the tract of land known as the Huddleston tract adjoining the above also the right of way through and across the Elk Ridge tract also adjoining the above, which said lands and right of way are more fully described in a deed from
175 William K. Smith and wife and Andrew G. Grinnan and wife and the said Andrew G. Grinnan trustee, to the aforesaid Forest Hill Mining and Manufacturing Company, bearing date the 15th day of June, 1859, together with all and singular the improvements tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, in trust nevertheless to secure the payment of the sums of money mentioned in sixteen certain promissory notes and eighty certain bonds according to the tenor and effect of said notes and bonds, and which said notes and bonds are in said deed particularly described. And whereas the said deed contains after a description of the premises aforesaid the following recital to wit: "It being understood that if default be made in the payment of either principal or interest of said notes and bonds (referring to the notes and bonds aforesaid) the said Robert Soutter as trustee when required so to do by the holder or holders of said notes or bonds, after giving public notice of the time and place of sale by publication in a daily newspaper published in the city of New York, for thirty days next preceding such day of sale shall expose the property hereinbefore conveyed" (referring to and meaning the premises described in said deed, as hereinbefore stated) "to public sale at the Merchants' exchange, in the city of New York, and sell the same to the highest bidder for cash." And whereas default has been made in the payment of two of the notes mentioned in said deed, to wit; the two therein mentioned of Charles F. Hale, and the same have not been paid, and also the payment of interest on all the bonds in said deed mentioned and in the payment of the principal of all
176 the said bonds which have become due and payable, neither all the interest upon nor the principal of the said bonds or either or any of them having been paid; and whereas the said party of the first — was more than thirty days before the sale hereinafter mentioned required by John Halstead hereinbefore named, the holder of the two notes last above mentioned and of fifty-one of said bonds, of which said fifty-one twenty-seven became due and payable on the first day of June in the year one thousand eight hundred and sixty-two, to expose the property hereinbefore described to public sale, and to sell the same in pursuance of and in accordance with the

trusts contained in said deed; and whereas the said party of the first part did in conformity with such requirement and in pursuance of and in accordance with the trusts contained in said deed and in pursuance of and in obedience to the directions contained in a judgment bearing date the second day of March, one thousand eight hundred and sixty-four, rendered by the supreme court of the State of New York in an action in that court wherein the said John Halstead is plaintiff and the said Robert Soutter and the said The Forest Hill Mining and Manufacturing Company are defendants, and after giving public notice of the time and place of sale, by publication in a daily newspaper published in the city of New York, namely the New York Evening Post for thirty days next preceding the day of sale, expose to public sale, and did sell at the Merchants' exchange in the city of New York, on the sixth day of May in the year one thousand eight hundred and sixty-four, under the direction of Murray Hoffman, Esquire, the refferee named in
177 such judgment, the premises hereinafter described to the said party of the second part who was the highest bidder at such sale, for the sum of thirty-five hundred dollars. Now therefore this indenture witnesseth that said party of the first part in consideration of the premises and of the sum of thirty-five hundred dollars to him in hand paid the receipt whereof is hereby acknowledged hath granted, bargained, sold, aliened, remised released conveyed and confirmed, and doth hereby grant bargain sell alien remise release convey and confirm unto the said party of the second part his heirs and assigns all that certain tract of land situate in Fayette county West Virginia and known as the Forest Hill tract containing two thousand acres more or less. (Also a lot piece or parcel of land containing one hundred acres more or less, provided in said deed to be surveyed off the west side of the tract of land known as the Huddleston tract, as the same was ascertained and bounded by the survey made subsequently to the execution of the said deed and in pursuance thereof, adjoining the above.) Also the right of way through and across the Elk Ridge tract also adjoining the above, which said lands and right of way are more fully described in a deed from William K. Smith and wife and Andrew G. Grinnan and wife and the said Andrew G. Grinnan, trustee to the aforesaid Forest Hill Mining and Manufacturing Company bearing the same date as the deed of conveyance in trust first above mentioned, together with all and singular the improvements, tenements and hereditaments and appurtenances thereunto belonging
178 or in anywise appertaining.

And all the right title and interest which the said party of the first part as the trustee named in said deed ever had or has in the lands and tenements last described. To have and to hold the same unto the said party of the second part his heirs and assigns forever.

In witness whereof I have hereunto set my hand and seal the day and year first above written.

ROBERT SOUTTER, *Trustee.* [SEAL.]

In the presence of—
The word the on the 10th line from the top of the third page first erased and the word all on the same page interlined on the fourth line—

MURRAY HOFFMAN.
CHARLES NETTLETON.

STATE OF NEW YORK, *City and County of New York,* } *ss:*

I, Charles Nettleton, a commissioner appointed by the governor of West Virginia for the State of New York, do certify that Robert Soutter, trustee, whose name is signed to the writing above, bearing date on the sixth day of June, A. D. 1864, has acknowledged the same before me in my State aforesaid.

Given under my hand and official seal this 24th day of June, 1864.

[SEAL.] CHARLES NETTLETON,
Commissioner for West Virginia in New York.

179 STATE OF NEW YORK, *City and County of New York,* } *ss, To wit:*

I, Charles Nettleton, a notary public for the county aforesaid, in the State of New York, do certify that Robert Soutter, whose name is signed to the writing above, bearing date on the sixth day of June, A. D. 1864, has acknowledged the same before me in my county aforesaid.

Given under my hand and notarial seal this 24th day of June, A. D. 1864.

[SEAL.] CHARLES NETTLETON,
Notary Public in and for the City, County, & State of New York.

STATE OF WEST VIRGINIA, *County of Fayette.* }

RECORDER'S OFFICE, *January 29th,* 1866.

The foregoing deed, being duly stamped according to law, *and* with the certificates of acknowledgment thereto annexed, was presented in said office and admitted to record.

Teste: G. M. BLUME, *Recorder.*

STATE OF WEST VIRGINIA, *County of Fayette,* } *ss:*

I, E. B. Hawkins, clerk of the county court of said county, the same being a court of record, do hereby certify that the foregoing is a true copy as appears from the records in my
180 office.

In testimony whereof I hereunto set my hand and affix the seal of said court this 26 day of October, 1886.

E. B. HAWKINS, *Cl'k.*

In the Circuit Court of Greenbrier County, State of West Virginia.

A. G. GRINNAN, in His Own Right and as Trustee, &c.,
vs.
S. C. LONG & Others

and

F. B. CHEWNING
vs.
COWAN & Others.

Petition for Removal to the District Court of the United States for the District of West Virginia, Having Circuit Court Powers.

To said circuit court of Greenbrier county:

Your petitioner respectfully shows to this honorable court that the matter and amount in dispute in the first above-entitled suit exceeds, exclusive of costs, the sum and value of five hundred dollars; that your petitioner is a party to the said first-entitled suit, but he is not a party to the said second-entitled suit.

That the controversy in said first-entitled suit is between citizens of different States, and that the petitioner was, at the time
181 of the commencement of said suit, and still is a citizen of the State of Pennsylvania, and that the complainant, A. G. Grinnan, was then and still is a citizen of the State of Virginia, and that the Forest Hill Mining and Manufacturing Company, a corporation duly and regularly created, &c., was then and still is a citizen of the State of New York, and that P. W. Morgan, adm'r, &c., of Wm. K. Smith, dec'd, was then and still is a citizen of the State of West Virginia.

Your petitioner states that in the said suit first above mentioned there is a controversy which is wholly between citizens of different States and which can be fully determined as between them, to wit, a controversy between the said petitioner and the said A. G. Grinnan in his own right and as trustee, &c., the said Forest Mining and Manufacturing Company, and the said P. W. Morgan, administrator, &c., of Wm. K. Smith, dec'd; that the nature of the controversy is the partitioning and laying off a certain tract of land between the rightful owners of the same, as set out in the answer of your petitioner filed in the said first-mentioned suit during the present term of your honor's court; that all the other parties to said first-mentioned suit are citizens of States other than the State of Pennsylvania, and they — merely nominal and not indispensable to the controversy between your petitioner and the parties
182 above named whose citizenship *are* given.

And your petitioner offers herewith a bond with good and sufficient surety for his entering in said district court of the United States, having circuit court powers, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said district court if said court shall hold that this suit was wrongfully or improperly removed thereto.

And he prays this honorable court to proceed no further herein, except to make the order of removal required by law and to accept the said surety & bond and to cause the record herein to be removed into said district court of the United States in and for the district of West Virginia; and he will ever pray.

JOHN HALSTEAD.

BURLEW & DAVIS, *Att'ys.*

Know all men by these presents that I, John Halstead, as principal, and A. Burlew and J. W. Davis, as sureties, are held and firmly bo-nd unto A. G. Grinnan and all other persons whom it may concern in the penal sum of five hundred dollars; to which payment we bind ourselves and each of us by these presents. Given under our hands this 5th day of November, 1886.

183 Yet upon this condition: The said John Halstead having petitioned the circuit court of Greenbrier county, State of West Virginia, for the removal of a certain cause therein pending, wherein A. G. Grinnan, in his own right and as trustee, is plaintiff and John Halstead and others are defendants, to the district court of the United States, having circuit court powers, in and for the district of West Virginia:

Now, if the said John Halstead, your petitioner, shall enter in the said district court of the United States on the first day of its next session a copy of the record of the said suit and shall well and truly pay all costs that may be awarded by said district court of the United States of said court shall hold that said suit was wrongfully or imperfectly removed thereto, this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this — day of November, 1886.

JOHN HALSTEAD. [SEAL.]
A. BURLEW. [SEAL.]
J. W. DAVIS. [SEAL.]

STATE OF WEST VIRGINIA, *Kanawha County,* } *ss:*

184 I, A. Burlew, of said county, one of the sureties named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the State of West Virginia and a property-holder therein; that I am worth the sum of five hundred dollars over and above all my liabilities and debts and exclusive of property exempt from execution; that I have property in the State of West Virginia liable to execution of the value of more than five hundred dollars.

A. BURLEW.

Subscribed in my presence by A. Burlew and by him sworn to before me this 6th day of November, 1886.

EDW'D M. CRAIG,
Notary Public.

Bond for Removal.

STATE OF WEST VIRGINIA:

Whereas in the chancery suit of A. G. Grinnan against Sydney C. Long and others and the chancery suit of F. B. Chewning against J. F. Cowan and others, consolidated and pending in the circuit court of Greenbrier county, John Halstead has this 1st day of November, 1886, tendered to said circuit court his petition, representing that, at the June term of said circuit court, to wit, on the 10th day of July, 1882, a decree was entered in said causes against the
185 petitioner in an order of publication, and representing also that, at the April term of said court, to wit, on the 27th day of April, 1883, one other decree was entered in said causes against the petitioner as an order of publication, and praying that said causes and the proceedings therein, including said decrees, may be reheard, &c.—

Now, therefore, we, John Halstead, principal, and A. Burlew and James W. Davis, sureties, do hereby undertake to pay all such costs as have been or may be awarded against said John Halstead in said causes in case he shall fail to obtain a decree therein.

Witness our hands this first day of November, 1886.

JOHN HALSTEAD.
A. BURLEW.
J. W. DAVIS.

Com'r John A. Preston's Report. Filed June 21st, 1882.

CHEWNING *vs.* COWAN *et al.* and GRINNAN *vs.* LONG *et al.* } In Chancery.

LEWISBURG, W. VA., *June 10th*, 1882.

186 To the circuit court of Greenbrier county:

Pursuant to a decree of the said court entered in the above-entitled causes on the 10th day of November, 1880, the undersigned, who was thereby directed to report upon certain matters submitted to him, respectfully submits the following report:

After giving the notice required by said decree by publication in the Greenbrier Independent (copies of said decree and notice are herewith filed) (see printed Record, page 142) your commissioner proceeded at his office, in the town of Lewisburg, W. Va., on the 11th day of March, 1882, to comply with the requirements of said decree, and said proceedings, not being then and there completed, were continued down to the date above written, when they and this report were closed.

The depositions taken are returned herewith, marked depo. of A. G. G., 1882.

1st.

Whether the alleged liabilities as to deficiency of acreage (of Forest Hill tract) and loss of "right of way" (through Elk Ridge tract) are likely to result in the establishment of any claim against the trust fund, &c.

1st. Your comm'r would report that the suit of Halstead *vs.* Buster, pending in the United States district court at Charleston, for the recovery of 100 acres (part of the Forest Hill tract), has been
187 decided in favor of Halstead, the vendee of those claiming under A. G. Grinnan, trustee, so that no liability will arise against the trust fund on account of deficiency of acreage of said tract. See judgment of U. S. court, herewith filed, marked "Halstead *vs.* Buster;" also deposition of A. G. Grinnan, marked A. G. G. No. 1.

2nd. Your comm'r would report that the deed from W. H. Edwards to W. K. Smith and A. G. Grinnan or a copy thereof for the two thousand acres known as the Forest Hill tract, dated Oct. 7th, 1857, has been filed before him, and in said deed "a right of way through any portion of the remaining part of the 7,000-acre tract" is granted. The 7,000-acre tract was divided into two tracts, one of 2,000 acres, known as the "Forest Hill" tract, and one of 5,000 acres, known as the "Elk Ridge" tract. W. H. Edwards was the owner of both tracts. He deeded the 2,000-acre tract (Forest Hill) to Smith & Grinnan and the same has been paid for in full; in said deed he granted the right of way aforesaid. He also deeded to Smith the 5,000-acre tract (Elk Ridge) and Smith deeded a certain interest therein to Grinnan, but the purchase-money was not all paid and said tract was sold for balance of purchase-money and said Edwards became the purchaser. Grinnan instituted
188 suit for the recovery of said tract from said Edwards, but the suit was decided in favor of said Edwards and he now owns said tract of land. As said Edwards deeded the Forest Hill tract to said Smith and Grinnan with a "right of way" through said Elk Ridge tract, and as said Edwards is now the owner of said Elk Ridge tract, your comm'r is of opinion that said Edwards is bound by his deed and that he cannot prevent the owners of Forest Hill having a "right of way" through said Elk Ridge tract so long as he is the owner of it.

Therefore your comm'r is of opinion that there is no immediate lik-lihood of the "establishment of any claim against the trust fund." The deed from Edwards to Smith & Grinnan for the Forest Hill tract of 2,000 acres is herewith filed, marked "W. H. E. to S. & G."

IInd.

Whether the assignee of Dodge, Bacon & Co. and the adm'r of —— Boyd, dec'd, and said A. G. Ginnan have any claim against the said trust fund and the amount thereof.

1st. Your comm'r would report that the claim in favor of the assignee of Dodge, Bacon & Co. has been withdrawn by the party who

filed it. Had it not been withdrawn your comm'r is of opinion that as the deed of trust securing the creditors whose debts have been allowed in this case expressly excluded said claim it could not be allowed. For withdrawal of said claim see letter of A. G.
189 Grinnan, herewith filed, marked "A. G. G. for D., B. & Co.'s claim."

2nd. Nothing has been filed before your comm'r to *to* show that there is any claim in existence in favor of said adm'r of —— Boyd, dec'd, except depo. of A. G. Grinnan; therefore he reports that there is no such claim against the "trust fund."

3rd. Dr. Grinnan has given his deposition in reference to his claim for damages that should be allowed him on account of W. K. Smith's failure to pay the balance of purchase-money due on the Elk Ridge tract, by reason whereof said tract was lost.

The whole matter is fully set forth in the petition heretofore filed in this cause by said Grinnan, and the same statement is made in the deposition filed before your comm'r by him.

In the report made by your commissioner dated Oct., 1880, the matters set up in said petition were referred to the court, as they were of a very intricate nature, raising questions of law that would have to be decided by the court, but the order under which your commissioner is now acting requires him to report "whether said Grinnan has any claim against the trust fund and the amount thereof," thus directing to report upon the matters submitted to the court by his former report. Dr. Grinnan's claim is for a balance of $6,398.00, which W. K. Smith failed to pay W. H. Edwards on
190 the Elk Ridge tract, 5,000 acres, and in consequence of which said tract of land was lost to said Grinnan. The facts, without great particularity, are about these: Smith conveyed Oct. 1st, 1857, to Grinnan "a one-half interest in the proceeds or profits" in the Elk Ridge tract, which he (Smith) had purchased of W. H. Edwards, but all the purchase-money had not been paid. (Grinnan had advanced money to Smith with the understanding that Smith should pay the same on the amount he owed Edwards on the Elk Ridge tract, but Grinnan claims Smith did not so apply the money furnished him.) Smith gave his *his* note to Edwards for balance of purchase-money and same day executed a deed of trust on said tract to secure said note. Smith did not pay said note at its maturity, and Edwards had the land sold and bought it in. Grinnan then brought suit for the land, which resulted in a compromise, Grinnan paying $3,000.00, leaving a balance of $6,398.00 "as a lien on the land," as stated in said Grinnan's petition, for which sum Smith gave his bond to Edwards, and Edwards, on the 6th day of Oct., 1860, executed a title bond to Smith for said land, Grinnan not assuming any liability for Smith's note. Smith failed to make any further payments, and in August, 1864, the land was sold under a de-
191 cree of the circuit court of Kanawha county for the balance *for the balance* of the purchase-money, and Edwards again became the purchaser. Grinnan sought to recover the land from Edwards, but lost the case in 1881. He now claims that he is entitled to be paid out of the trust fund said sum of $6,398.00, with in-

terest thereon from August 30th, 1864, the date of sale, and the damage he *he* has sustained in consequence of the loss of said tract of land.

He claims he is entitled to be paid out of the trust fund because his property was sold for a debt Smith had agreed with him to pay, and that the deed of trust given by Smith to him Feb. 10th, 1859, expressly provided that there should be paid from the net proceeds of the land, "first, * * * the debts due or that may become due said Grinnan from said Smith or for which said Grinnan may be or may become liable as security or on account of said Smith either before or after the date of this paper."

After examining said deed of Oct. 1st, 1857, from Smith to Grinnan, and reviewing the proof taken, the accounts and reports made, and the decrees entered in these causes, your commissioner is of opinion that said Grinnan is not entitled to payment of said amount out of the trust fund to the detriment of creditors of said
192 Smith, whatever his right might be as to Smith himself.

IIIrd.

At the request of Samuel Price, Esqr., your commissioner reports the following debt against the trust fund:

Account of Samuel Price and R. F. Dennis, for professional services rendered the trustee in c't c't of Greenbrier and court of appeals, $500.00.

See account filed and affidavit of said Price & Dennis accompanying same.

A debt in favor of Thomas Philips, due by W. H. Smith, has also been filed before your commissioner and properly proven and allowed.

Amount of bond, due Nov. 20th, 1848	$703 07
Interest to June 10th, 1882—33 y. 6 m. 20 d.	1,415 23
Total	$2,118 30

All of which is respectfully submitted.

JOHN A. PRESTON, *Comm'r.*

Deposition of A. G. Grinnan, Taken 27th Day of Feb., 1882, at the Office of Thomas W. Garner, Notary Public in and for the County of Kings, State of New York.

193 The deposition of A. G. Grinnan, Madison county, Va., taken this 27th day of Febr'y, in the year 1882, at the Astor house, New York city, pursuant to notice hereunto annexed, to be read as evidence in the suits of Chewning, adm'r, *vs.* Cowan, &c., and A. G. Grinnan *vs.* S. C. Long & *al.*, in circuit court of Greenbrier county, West Virginia, taken between the hours of —.

The deponent, having been duly sworn, says that in or about the year 1857 one Wm. K. Smith, of Fredericksburg, Virginia, stated to

him that he owned large and valuable tracts of coal lands in Fayette county, West Virginia, and that by reason of his indebtedness to others & to one Wm. H. Edwards, who held a deed of trust on the Elk Ridge estate of some 7,000 acres & who had sold & bought in said tract under the deed of trust, but who had offered him a short time in which to redeem the same, that he, the said Smith, would loose this tract and other lands unless he would raise money to pay said Edwards and offered, among other considerations, to convey about one-half of 5,000 acres of said Elk Ridge tract to the deponent for advancing certain sums of money & for raising more by endorsing said Smith's bond and generally aiding him in negotiating sales, & that said deponent should also hold all other lands in Fayette Co. aforesaid as security to secure all liabilities to deponent & which may arise out of the trans-
194 action from said Smith to deponent, and that deponent also should hold the said property after all liabilities to him were settled for the payment of Smith's debts, and as inducement to cause said deponent to enter into the agreement and arrangements with said Smith, who was well known as irresponsible and not very reliable, made an estimate on paper showing that the deponent, chiefly by reason of having his ½ interest in said 5,000 acres of Elk Ridge estate, could fairly expect to realize in a short time comparatively forty-eight thousand dollars; and deponent further states that he did enter into & consummate the arrangements with said Smith, paying him over a considerable sum of money & going his security to his friend and relative, G. B. Wallace, for a large sum, some six or seven thousand dollars, and that the chief inducement thereto was the interest in said Elk Ridge tract, and, further, that said Smith agreed to pay all the moneys he received by & through deponent to said Edwards to release the lien on the land, and would himself assume & pay any balance over and above what may be due said Edwards; and deponent further says that said Smith did not pay all the moneys furnished him to said Edwards, and that there was a much larger balance therefore due Edwards than deponent contemplated or expected, & that for this balance said Smith
195 executed his note to Edwards and received a bond or deed for the Elk Ridge tract, then reduced by cutting off the Forest Hill tract to 5,000 acres; that Smith did not pay his bond to said Edwards as he had agreed to do & Edwards sold out the land again, & that after some litigation with said Edwards and having to pay him about three thousand dollars in said bond of Smith's and giving extension of time that said Smith again failed to pay the balance of the bond which fell due during the war; that said Smith was in England during most of the war, and could have paid W. H. Edwards, who resided in the North, and had money & means to pay with, as deponent knows & believes, and that in or about 1864 said Edwards again sold out the land called Elk Ridge for the balance due him by said Smith by decree of circuit court of Kanawha county, West Va. After the war the deponent brought suit to recover, was cast, & took it to court of appeals, was beaten there and filed a new bill in the case, and the matter was decided against him

in said court in December last; and deponent further says that while these matters were pending he did not feel altogether at liberty to set up a claim for loss of his interest in the Elk Ridge tract, though really that loss would relate back for many years, and
196 that he has been deprived of the possession or use of it since 1864, and would have derived profits during all that time by sales of timber & rents & royalties on coal.

And deponent further says that the tract has *and rich &* rich veins — coal on it, is situated on Armstrong creek and very near the Kanawha river, and that before the late war he did negotiate a sale thereof for $100,000, but that owing to the death of a party the sale fell through and that he believes the said Elk Ridge tract, which is in almost the heart of the coal region of Kanawha, is now worth from thirty to fifty dollars per acre, and worth at a moderate estimate certainly $150,000, and that the conveyance to him by said Smith has not resulted in any benefit to him as promised by said Smith and estimated to him as an inducement to enter into contracts aforesaid with him, and that said Smith did not pay his indebtedness to said Edwards as he agreed to and with deponent, and that by failure of title & failure to pay off his said debt to Edwards very great loss has accrued to deponent, not less than $50,000 or $75,000, and perhaps more; and deponent further shows that in or or about October, 1857, when said Smith conveyed him his property in Fayette Co., West Va, to hold in secret trust that at the time of executing the deed a paper or agreement of secret trust was executed as a part of the deed and duly acknowledged, & that he filed this original paper in the said suit of Chewning, adm'r,
197 *vs.* Cowan & Grinnan *vs.* S. C. Long & *al.*, (and that the paper marked Exhibit C, on page- 96 & 97 of the printed record of said first-named suit, printed for the appeal to the court of appeals in case of A. G. Grinnan *vs.* Long & others, &c., is a true copy of such original), and that after said paper was executed, supposing that he had power to withhold this paper, a second agreement of trust was made in February, 1859, which was recorded, and the very existence of the 1st secret agreement of trust was for a long time forgotten by deponent, nor did he understand its probable importance, though, as he is now informed, it was really a part of the conveyance of trust of Oct. 29, 1857, and of equal validity therewith, and that in both these agreements of trust deed defining the same the liabilities of said Smith to deponent are debts of the 1st class; and deponent further says that in both these said papers Wm. K. Smith estimated his indebtedness to his son-in-law, said Chewning, at $10,000, but in the agreement of trust of Febr'y, 1859, it was stated that it might exceed this sum, but said Smith did not intimate that it could much exceed this sum, nor that he intended to secure him much, if any, over that amount; and deponent further says that said Smith — his indebtedness to his wife, Abigail H. Smith, for relinquishment of dower, $25,000, but did not make or furnish deponent with any estimate thereof; and deponent is fully under the im-
198 pression that he explained to said Smith that the courts would only sanction the securing to Mrs. Smith the actual

value of relinquishment which said Smith had at the time of the making of these agreed to make good to his said wife; and deponent further shows that in conveying the land to the Forest Hill Company adjoining Elk Ridge that he and said Smith conveyed the right of way through the Elk Ridge tract of 5,000 acres, and that most of the Forest Hill Co. coal lands can only be reached and mined for coal by means of a road through Elk Ridge tract, and that by reason of Edwards gaining the suits aforesaid and holding the Elk Ridge tract that the failure of right of way through it to the Forest Hill Company may entail upon said deponent damage to a large amount, not yet capable of accurate estimate, but probably reaching three or four thousand dollars, and that said Smith would be liable to him for the amount of such loss and damages, and that he is entitled to a first lien on the trust fund for —.

And deponent further shows that but for his allowances & endorsements for Smith as aforesaid in 1857 he would have lost all his real estate in West Va., and there would have been no trust subject, and that but for his care thereof afterwards, before the war, it would have been lost, and that after the war, but for his efforts
199 in relieving it of embarrassing position in which it was placed by said Smith & J. F. Cowan and large advances made by him to pay taxes and current expenses and to keep said G. B. Wallace from closing his deed of trust on the most valuable part of the Loup Creek tract, the land which constituted the subject of the trust fund would have been entirely lost, and that in preserving it & caring for it he has been compelled for many years to make fatig-ing journeys once or twice a year from Virginia to W. Va., mostly by stage, & engage in numerous & troublesome litigations which were sources of endless trouble & vexation, and that said Chewning, plaintiff, never made any advance, though requested by deponent to do so, and threw upon him the entire onus of protecting the property, and that the commissions allowed him were entirely inadequate to repay him, and that by the loss of the Elk Ridge property he gets but little compensation for his long-extended efforts and large advances to preserve the property, and that it is but reasonable & just, independent of any contracts with Smith, that the loss of this large property should in some measure be made good to him, and that he should be protected from further loss by reason of damages which may accrue to him by breach of warranty on part of Smith; and deponent further says that he does not owe the trust fund the amount alleged in commissioner's report, & that there *is*
200 some large mistakes in the same, some of which are noted on his exceptions thereto, and, if he did, his just claims against said fund, as herein stated, would largely exceed any alleged amount due by him under the amount of damages which may otherwise accrue to him.

And the deponent further shows that a very large part of the fund which he charges himself with having received was not paid by S. C. Long in money, but by various purported drafts & acceptances & receipts under said Long's own handwriting, and that deponent having then unbounded faith in him since settled for a large part of

that fund by these; but that afterwards, under injunction suit with said Long in Charleston, Kanawha, it was evident that a most important paper filed thereat had been tampered with, and upon their discovery being reported to said Long the injunction suit was at once dismissed, and that it became evident that the confidence in said Long was entirely misplaced, and that, having had abundant opportunities to impose upon deponent, he believes that these opportunities were availed of by said Long, and that large losses he charged himself with as having been received were really never paid him; and further this deponent saith not.

A. G. GRINNAN.

201 COUNTY & CITY OF NEW YORK, } *State of New York.* }

I, Thomas A. Garner, notary public in and for the county of Kings *Co.* & State of New York, do hereby certify that the foregoing deposition of A. G. Grinnan was duly taken and sworn to before me in New York county and State aforesaid this 27th day of February, 1882, between the hours of sunrise and sunset, and that no other witnesses appearing and no one appearing to cross-question the deponent that the taking of the depositions under the notice hereto attached was duly closed.

THOS. W. GARNER,
Notary Public, Kings Co.

Certificate on file in N. Y. Co.

Exceptions.

F. B. Chewning excepts to the within deposition on the following grounds:

1st. Because it is irrelevant.

2nd. Because it is argumentative.

3rd. Because it is made in large part of opinions, suppositions, and hearsay, and therefore incompetent.

4th. Because it was not taken pursuant to notice.

5th. Because it is not properly certified.

March 28, 1882.

HARRIS,
For Exceptant.

202 STATE OF NEW YORK, } *City and County of New York,* } *ss:*

I, William Butler, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, being a court of record, do hereby certify that Thos. W. Garner has filed in the clerk's office of the county of New York a certified copy of his appointment as notary public for the county of Kings, with his autograph signature, and was at the time — the annexed deposition duly authorized to take the same, and that I am well acquainted

with the handwriting of said notary public and verily believe that the signature to the annexed certificate is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 27th day of Feb.

[SEAL.] W. A. BUTLER, *Clerk.*

Notice.

CHEWNING, Adm'r,
vs.
COWAN & *als.*

and

A. G. GRINNAN
vs.
S. C. LONG & *al.*

Causes depending in the circuit court of Greenbrier county.

203 The plaintiffs in the first of the foregoing causes and the defendants in the other of said causes will please take notice that on the 27th day of this month, at the "Astor house," in the city of New York, I shall proceed to take the depositions of John J. Astor and others to be read as evidence upon the hearing of the aforesaid two causes; and if I shall from any cause fail to take or to *to* complete the taking of the said depositions on that day I shall continue the taking from day to day until they are all taken.

Very truly, A. G. GRINNAN,
By His Counsel, Samuel Price.

Febr'y 16th, 1882.

Endorsed: I accept service of the within notice this 16th day of Febr'y, 1882. John W. Harris, att'y.

WEST VIRGINIA:

At a circuit court held for Greenbrier county, at the court-house thereof, on the 15th day of July, 1882.

F. B. CHEWNING
vs.
J. F. COWAN & *als.*

and

A. G. GRINNAN
vs.
F. B. CHEWNING, Adm., &c.

Alexander F. Matthews, receiver of this court, made his report of his action under the decree heretofore rendered in these causes, directing him as such receiver to institute proper legal proceedings

in the courts of the State of Virginia to recover a judgement
204 against Andrew G. Grinnan for the sum of $20,900.42, with interest thereon at the rate of six per centum per annum from the 1st October, 1880, until paid, being the amount adjudged by the decree heretofore rendered in these causes to be in the hands of Andrew G. Grinnan, as trustee, belonging to the trust subject to these causes; by which report it appears that a judgment was rendered in the circuit court of Madison county, in the State of Virginia (the place of residence of said Grinnan), at the September term, 1881, of that court, in favor of said receiver against said A. G. Grinnan for said sum of money, with interest as aforesaid, and that an execution was issued upon said judgment immediately after the end of said term of court, which proved unavailing because of liens encumbering all the personal property of said Grinnan in said county, created by a deed of trust executed by said Grinnan and put on record during said term of Madison court, conveying all said personal property in trust to secure sundry debts of said Grinnan exceeding in amount the value of all said personalty; and it further appears that all the real property of said Grinnan in said county was encumbered by liens prior to the said rendition of said judgment, suffered and granted by said Grinnan to secure other debts due by him exceeding in amount the value of all said real property, and after diligent investigation made by competent counsel employed for the purpose the said receiver had not been able to find
205 or hear of any other property owned by or in which said Grinnan had any interest anywhere in the State of Virginia out of which any part of said judgment could be recovered.

And these causes coming on this day to be further heard upon the papers formerly read and upon said report of A. F. Matthews, receiver, and upon the report made by Com'r John A. Preston as to the matters referred to him by the decree entered in these causes the 10th day of November, 1880, and upon the exceptions taken to said report by Francis B. Chewning concerning the claim of Samuel Price and R. F. Dennis for 5 hundred dollars allowed to them by said report against the trust subject in these causes for professional services alleged to have been rendered by them to Andrew G. Grinnan, trustee, in these causes since the same has been pending in this court, and for services rendered in the court of appeals of West Virginia to said Grinnan, trustee, in the appeals taken by him from the decrees of this court, and these causes were argued by counsel; upon consideration whereof the court doth sustain said exception and decide that said claim is not a valid one against the trust subject in these causes, and the court, approving in all other respects the said report of Com'r Preston, doth confirm the same, and, approving said report of said Matthews, receiver, doth confirm the same.

206 And the court being of opinion that there is no liability against said trust subject because of the alleged dispute as to a deficiency of acreage in the Forest Hill tract sold and conveyed by said Grinnan as trustee nor any liability against the same because of the alleged probability of a failure of the grantees of said

Forest Hill tract to have a right of way over the adjoining Elk Ridge tract, and the court being further of opinion that A. N. Tift, as surviving partner of Corless & Co., the assignees of Bacon, Dodge & Co., has no claim against the trust subject, and that A. H. H. Stuart and —— Johnson, as administrators of —— Boyd, dec'd, have no claim against the trust subject and Andrew G. Grinnan, in his own right and as trustee of Wm. K. Smith and as trustee of Abigail H. Smith, has no claim against the trust subject over and beyond what has been allowed and reported in the accounts of his transactions as trustee of Wm. K. Smith which have been settled, stated, and reported in these causes by Commissioner Preston, the court doth accordingly so decide and decree.

And the court doth remove said Andrew G. Grinnan from the office and functions of trustee under the deed of October 29th, 1857, and the deed of trust of Feb'y 10, 1859, executed to him by Wm. K. Smith, which deeds convey to him the trust properties mentioned in the bills & proceedings in these causes.

207 And on the motion of Francis B. Chewning, who appears from the reports of Commissioner Preston aforesaid to own and represent the larger part of all the claims established by said reports against said trust subject, Comm'r Preston is directed to enquire, ascertain, and report to this court what are the lands, mineral rights, and other real estate of said Andrew G. Grinnan lying in the counties of Fayette and Kanawha which are subject to the lien of the said decree in these causes against said Grinnan for said sum of $20,900.42 and interest, and what, if any, are the other liens upon said real properties and the respective amounts and priorities thereof, and whether the annual income, issues, and profits of said real properties will suffice within five years to pay and satisfy said amount so adjudged against said Grinnan, and it appearing from the papers and proceedings in these causes that said Grinnan is entitled to an undivided half of the Huddleston tract of 125 acres in Fayette Co., and that the other moiety of said tract constitutes part of said trust subject remaining unsold, the said commissioner is further directed to ascertain and report whether said tract is susceptible of partition in kind consistently with the rights and interests of the said joint tenants thereof.

208 And in case it shall be ascertained and reported by Commissioner Preston that there are liens upon said interest of said Grinnan in said Huddleston tract or upon any other real property of said Grinnan in *in* Fayette or Kanawha counties, other than said lien of said decree in said causes, leave is granted to said F. B. Chewning by his counsel to apply to the clerk of the court to issue rules returnable to the next term of this court against the persons ascertained to hold such liens, to appear at said term and show cause, if any they can, why said real properties shall not be sold and the proceeds applied to satisfy said liens, and the said clerk shall thereupon issue such rules, and Commissioner Preston shall give notice of the time and place of his proceeding to execute these orders by making publication thereof in the manner prescribed by law.

WEST VIRGINIA:

At a circuit court held for Greenbrier county, at the court-house thereof, on the 10th day of July, 1882.

A. G. GRINNAN
vs.
S. C. LONG

and

F. B. CHEWNING
vs.
COWAN *et al.*

209 For reasons appearing to the court it is ordered that the decree entered in these causes on a former day of this term be set aside.

And on motion of Andrew G. Grinnan leave is granted to him to withdraw the petition heretofore filed by him in these causes and the exceptions heretofore taken by him to the reports made in these causes by Commissioner John A. Preston, and the said petitions and exceptions are accordingly withdrawn. Alexander F. Matthews, as the receiver of this court, this day made his report of his action under the orders heretofore entered in these causes, by which it appears that *that* a judgment was recovered in the circuit court of Madison county, in the State of Virginia, at the September term, 1881, of said court in his name as receiver against Andrew G. Grinnan for the sum of $20,972.42, with interest thereon, &c., being the amount adjudged by this court to be in the hands of said Grinnan belonging to the trust fund created by the deed of trust executed by Wm. K. Smith to said Grinnan, and that the said receiver was prosecuting said judgment against the property
210 standing in the name of said Grinnan in said county of Madison, so as to subject the same to sale, and all said property was encumbered by liens upon the same prior to that of said judgment, and that the sum of $— was due from said receiver to the clerk and sheriff of said circuit court for services rendered in said proceedings in that court.

And these causes *coming* on this day to be further heard on the papers formerly read and upon the said report of A. F. Matthews, receiver, and upon the report made by Commissioner John A. Preston as to the matters referred to him by the decree ordered in these causes on the 10th day of —— , and upon the exceptions taken— said report by Francis B. Chewning concerning the claim against the trust fund, allowed in said report of Samuel Price *five* five hundred dollars for professional services alleged by him as rendered to Andrew G. Grinnan, trustee, in these causes and in the court of appeals of West Virginia, and were argued by counsel; upon consideration whereof the court doth sustain the said exceptions and decide that the said claim of said Samuel Price is not a valid one against the trust subject in these causes; and the court, ap-
211 proving in all other respects the said report of Commissioner Preston, doth confirm the same.

And the court being of opinion that there is no liability against said trust fund, because of the alleged deficiency of acreage in the Forest Hill tract sold and conveyed by Andrew G. Grinnan, trustee, nor any liability because of the alleged failure on the part of the owners of said Forest Hill tract to have a right of way therefrom over the Elk Ridge tract; and the court being further of opinion that A. N. Tift, surviving partner of Corless & Co., the assignees of Bacon, Dodge & Co., has no claim against the trust subject, and that A. H. H. Stuart and —— Johnson, as administrators of —— Boyd, has no claim against the trust subject, and that Andrew G. Grinnan, in his own right and as trustee of W. K. Smith and as trustee of Abigail H. Smith, has no claim against the trust subject over and beyond what has been allowed and reported in the accounts of his transactions as trustee of William K. Smith, which has been settled, stated, & reported in these causes by Commissioner John A. Preston, the court doth accordingly decide and decree.

And, upon motion of Andrew G. Grinnan, leave is granted him to resign the office and duties of trustee under the deed of
212 October 29th, 1857, and the deed of trust of February 10th, 1859, executed to him by Wm. K. Smith relating to the trust properties mentioned in the bill and proceedings.

And the court doth further adjudge, order, and decree that John W. Harris, who is hereby appointed a special commissioner for that purpose, do sell at public auction or at private sale, as he may deem most advisable, for the purpose of obtaining the highest prices therefor, the following parcels of real property lying in Fayette county, which remain unsold of the trust properties conveyed in trust by Wm. K. Smith to Andrew G. Grinnan by his deeds of October 29th, 1857, and February 10, 1859, consisting of one undivided half of the tract called in the proceedings in these causes "the Huddleston tract," estimated to contain 125 acres, and the agricultural rights which remain unsold in several small parcels of land of the tract known as the Wilson survey, which were reserved from sale in the sale made by A. G. Grinnan of the Wilson survey lands to Long & Morris.

And it being admitted by the parties that the rents and profits of the other half of said Huddleston tract will not pay the debt decreed against said Grinnan within five years, the said commis-
213 sioner is further directed to sell at public or private sale the said other one undivided half of said Huddleston tract, which half was conveyed by W. K. Smith to A. G. Grinnan.

And said sales shall be made upon the following terms: Cash enough in hand to defray the expenses of said sale and the residue upon a credit of one and two years, with interest from day of sale, taking from the purchaser bonds with approved security for the deferred payments, and retaining the title as ultimate security, or said commissioner may, in his discretion, require one-third of the purchase-money to be paid in cash and dispense with any security for the deferred payments than that provided by the bonds of the purchaser and the retention of the title to the land.

But before making any public sale said commissioner shall ad-

vertise the time, place, and terms thereof for four successive weeks in some newspaper published in Greenbrier county, and in another published in the county of Kanawha, and in such other manner as he may deem expedient.

And the said commissioner is directed to report all sales made by him under this decree to this court for its approval.

214 And he shall not collect any of the proceeds of such sales until he shall have entered into bond before the clerk of this court, with security approved by said clerk, in the penalty of $10,000.00, conditioned according to law in such cases.

And at another day, to wit, at a circuit court held for Greenbrier Co., at the court-house thereof, on the 27th day of April, 1883.

A. G. GRINNAN
vs.
S. C. LONG.

and

F. B. CHEWNING
vs.
J. F. COWAN *et al.*

John W. Harris, the special com'r appointed (by the last decree in these causes) to sell the tract of land in Fayette county in said decree mentioned as the Huddleston tract and locally known as the Grinnan tract, this day made his report of his actings under said decree, by which report it appears that said comm'r exposed said tract to sale at public auction at Kanawha Falls, near the premises, on the 12 day of April, 1883, after having given one month's previous notice of the time, place, and terms of sale by advertise-

215 ment thereof in the Greenbrier Independent and the Kanawha Gazette, and that at said offering of sale there were several bidders for said land, and that said land was cried out to William Wyant, he being the highest bidder therefor, at the price of sixty dollars and 50 cents per acre, which bid, then being one hundred & fifty-four acres and $\frac{1}{8}$ of an acre in said tract (exclusive of the parcel of nine $\frac{74}{100}$ acres adjacent to said tract and hereinafter referred to), made the sum of nine thousand dollars and three hundred and twenty-four $\frac{56}{100}$ dollars, and that said William Wyant had complied with the terms of said — by paying to said commissioner on the day of sale the sum of $453.22, and subsequently the sum of $2,654.96, making the sum of thirty-one hundred and eight $\frac{18}{100}$ —, and had executed to said commissioner his two bonds, which, as credited by certain payments made thereon, reduced them to the sum of $3,108.19 each, which is the amount for which they should have been drawn if said Wyant had, on the day of sale, paid the full amount of cash, being one-third, which was paid in the two installments of $453.22 and $2,654.96, above mentioned, which said two bonds bear date April 12th, 1883, and are payable, respectively, twelve and twenty-four months after date, and with interest from date.

216 And that said commissioner inasmuch as it appeared by the survey made of said tract of land by H. J. Tucker, surveyor (a map of which survey made by said surveyor is returned with said report of Commissioner Harris), that there is a parcel of land containing nine $\frac{74}{160}$ acres lying adjacent to the southerly line of said tract which was claimed by the former owners of the said Huddleston or Grinnan tract as a part thereof and to which there is no claim set up by the owners of the land adjacent to said parcel so far as said commissioner could ascertain, but which parcel of land was not covered by the lines of said Huddleston or Grinnan tract as run by said surveyor, and that for these reasons said Commissioner Harris deemed it expedient to announce at said public offering of said tract of 154⅛ acres that the purchaser thereof at said sale, if confirmed by the court, should receive from said comm'r by order of the court in these causes a quitclaim to said parcel of nine $\frac{74}{160}$ acres—

And it further appearing from said report that said commissioner considered said bid of said William Wyant a fair and full price for said land and recommended the confirmation of said sale,

217 these causes came on this day to be further heard on the papers formerly read and upon said report of sale and *was* argued by counsel.

Upon consideration whereof, there being no exception taken to said report, the court, approving, doth confirm the same and doth confirm the said sale so made of said tract of land to the said William Wyant.

Upon the motion of Marye and Fitzhugh and John W. Harris, the counsel who have conducted these causes on behalf of the creditors entitled to recover the proceeds of the sale of the property conveyed by the deed of trust made by Wm. K. Smith to Andrew G. Grinnan (in the proceedings in these causes mentioned), the court doth allow a fee for their said services in this court (and in the matters of the appeals to the supreme court of appeals of this State taken by said Grinnan from the decrees of this court in these causes) of six hundred dollars to be paid to said counsel out of the said cash payment by said Commissioner Harris, and, — the motion of said Marye & Fitzhugh and upon the affidavit this day filed by John L. Marye in regard to the professional services of said attornies in regard thereto, the court doth allow to said Marye & Fitzhugh a

218 fee of two hundred dollars for their services in obtaining in the circuit court of Madison county, in the State of Virginia, a judgment of that court in favor of Alexander F. Matthews, receiver of this court, against said Andrew G. Grinnan for the sum of $21,013.24 and the interest thereon (decreed heretofore in these causes to be paid by said Grinnan to said receiver) and their services in further proceedings taken by them in said courts in subjecting the property of said Grinnan to sale to satisfy the liens thereon so as to ascertain whether any satisfaction could be obtained for said judgment of said receiver, which last-named fee shall be paid by Commissioner Harris out of said cash payment in his hands.

And it appearing by a written statement marked X X, which has

been made by Comm'r John A. Preston and is filed with the said report of Special Commissioner Harris, that the costs of these causes remaining unpaid, together with the costs and charges of said sale, amount to $450.59, and that the costs in said suits and proceedings in said circuit court of Madison county, incurred in behalf
219 of said receiver, amounts to $77.60, and that there is due Alex'r F. Matthews, as receiver, for his services under the decrees in these causes a fee of $25.00, the court doth direct and order that said Commissioner Harris do, out of said cash payment in his hands, pay the said several amounts above stated to the parties entitled thereto, the said costs in said suits in Madison circuit court to be paid — Harris to Marye & Fitzhugh, who shall account for same to the parties entitled thereto.

And it further appearing from said statement X X that there will remain of said cash payment after paying thereout the sums hereinabove ordered to be paid the nett amount of $1,754.99 in the hands of said Harris, which is distributable in ratable proportion among the creditors aforesaid secured in said deed of trust according to the relative amounts of their respective claims as shown by said statement (which statement excludes from participation in said distribution the claims reported by Com'r Preston as owned by said Andrew G. Grinnan,, who is the assignee of said
220 claims), and that the said nett sum of $1,754.99 for distribution will pay a percentage of 14 per cent. and .6683 of one per cent. on the said claims entitled to share ratably in said nett amount, after adding to said nett amount the sum of $18,024.82, paid by A. G. Grinnan out of the trust fund in part of the claims of F. B. Chewning and Abigail H. Smith, but that the dividends so shown as coming to the claims of said F. B. Chewning in his own right and as administrator will be abated by said sums so heretofore received out of the trust fund upon said claims, as shown by the reports of Comm'r Preston, the court doth adjudge, order, and decree that said Comm'r Harris do distribute and pay said nett sum of $1,754.99 ratably among said creditors, paying to each creditor the amounts stated in said statement X X as the rateable dividend of each creditor therein, the dividends coming to the claims of said F. B. Chewning in his own right and as assignee of other claims and as administrator of A. H. Smith, dec'd, and to the claims of Samuel Philips & Sons and George Hamilton, Jr., & of Wm. H. Fitzhugh, ex'c'r, and Thos. C. Catlett and Thos. Philips, to be paid by
221 said Com'r Harris to Marye and Fitzhugh, as attornies representing said claims.

And the court doth further order and direct that said Comm'r Harris do collect the said bonds given by said William Wyant for the deferred instalments of said purchase-money as the same shall fall due, and he is further authorized to collect and receive any sums which may be collectable for the trust fund arising from the sales made by said A. G. Grinnan of agricultural rights in the lands conveyed by said deed of trust which appear in the proceedings in these causes, and said Harris is hereby substituted to all the authority as to these claims of the trustee, A. G. Grinnan, and is

authorized, at his discretion, to employ an agent to act in the collection of such claims and to bring suit for the enforcement of such of said debts as are ascertained to be due or for the recovery back to the trust fund of the rights reserved in the sale of the Loup Creek tract, provided that no expense be incurred in such suits, except as may be met by the recoveries effected in such suits; and the
222 said Comm'r Harris shall report his proceedings hereunder to this court.

And upon the application of said William Wyant a writ of possession shall issue, directed to the sheriff of Fayette county, to put him in possession of the land purchased by him in this cause.

Mandate of the Court of Appeals.

WEST VIRGINIA:

In the Circuit Court of Greenbrier County.

JANUARY 9TH, 1884.

WEST VIRGINIA, *To wit:*

At a supreme court of appeals held in Wheeling, in Ohio county, on the 24th day of November, 1883.

A. G. GRINNA-, Plaintiff Below, Appellant,

vs.

S. C. LONG, G. W. NORRIS, P. W. MORGAN, late sheriff of Kanawha county, and as such administrator of Wm. K. Smith, deceased; Gustavus B. Wallace, Edmond Carter, Patsy Dillard, the personal representative of Wm. J. Roberts, whose name is unknown; James Gray, Louisa B. Hoe, Wm. H. Fitzhugh,
223 executor of H. H. Paxton; —— Emanuel, whose baptismal name is unknown, adm'r of H. Philips; George Hamilton, The Forest Mining and Manufacturing Company, Jno. Halstead, F. B. Chewning, in his own right and as adm'r of Abigail H. Smith; all creditors of Wm. Smith whose debts have been acknowledged in writing by him to be just and who are entitled to any share of the trust fund created by deeds of trust executed by Wm. J. C. Smith to A. G. Grinnan, trustee, dated October 29th, 1857, and February 10th, 1859, whose names are unknown, and J. N. Tift, surviving partner of J. W. Corless & Co., Defendants Below and Appellees.

Upon an appeal from a decree of the circuit court of Greenbrier county rendered on the 10th day of November, 1880.

The court, having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel thereon, is of opinion, for reasons stated in writing and filed with the
224 record, that there is no error in said decree for which the same should be reversed; it is therefore adjudged, ordered, and decreed that the decree of the circuit court of Greenbrier county rendered in this cause on the 10th day of Nov'r, 1880, be, and the same

is hereby, corrected by deducting from the amount therein stated to be in the hands of A. G. Grinnan, trustee, belonging to the trust fund the sum of $90.82, the amount stated in the decree being that much in excess of the true amount, and that thus corrected the said decree be, and the same is hereby, affirmed, and that the appellant do pay to the appellees their costs about their defense in this court in this behalf expended and damages according to law, which is ordered to be certified to the circuit court of Greenbrier county.

A copy from the record.

Attest: O. S. LONG, *Cl'k.*

And at another day, to wit, at a circuit court held for Greenbrier Co., at the court-house thereof, on the 3rd day of May, 1884.

225 *On Rule.*

F. B. CHEWNING
vs.
J. F. COWAN

and

A. G. GRINNAN
vs.
S. C. LONG.

On motion of John W. Harris, commissioner, who made sale of the land sold under decrees entered in these causes, a rule is awarded against Wm. Wyant, who purchased the tract of 154⅛ acres of land, returnable on the first day of the next term of this court, requiring him to show cause, if any he can, why he shall not be fined and attached for his failure to pay the balance due on his bond of $4,444.67, dated April 12th, 1883, payable twelve months after date, with interest from date, which balance appears to be $3,108.19, or why a decree shall not be entered against him for the amount of said residue, with the interest accrued and costs of this rule, and execution to be awarded, endorsed "No security to be taken," or why the land shall not be decreed to be resold at his risk and costs.

And at another day, to wit, at a circuit court held for Greenbrier county, at the court-house thereof, on the 28 day of June, 1884.

226 *On Rule.*

F. B. CHEWNING
vs.
J. F. COWAN

and

A. G. GRINNAN
vs.
S. C. LONG.

The rule awarded in these causes on a previous term of this court having been returned executed on Wm. Wyant, and he still failing

to appe r to answer said rule to show cause why he should not be find & attached for his failure to pay the balance due on his bond of $4,444.67, dated April 12th, 1883, and payable twelve months after date, with interest from date, which balance appears to be $3,108.19, executed to John W. Harris, commissioner, by said Wm. Wyant, or why execution should not issue on said bond, endorsed " No security *security* to be taken," against him for the amount of said residue, with interest accrued and costs of this rule, or why the land so purchased should not be resold for the payment of said bond at his risk—

It is adjudged, ordered, and decreed that unless said sum of $3,108.19, with its interest as aforesaid, and now aggregating $3,158.50, and the costs of this rule are paid to the said Harris by the rising of this court, that then said Commissioner Harris may sue out execution against said Wm. Wyant for the said balance of $3,158.50, with interest from this date, and the costs of this
227 rule as aforesaid, endorsed " No security to be taken."

And leave is given to the said comm'r to apply for a resale of said property or any other relief to which he may be entitled.

And at another day, to wit, at a circuit court held for Greenbrier county, at the court-house thereof, on the 8th day of November, 1884.

A. G. GRINNAN
vs.
S. C. LONG *et al.*

and

F. B. CHEWNING
vs.
J. F. COWAN *et al.*

These two causes came to be again heard together this 8th day of Nov'r, 1884, upon the papers formerly read, the report of collections made by John W. Harris, special commissioner in these causes, dated November 1st, 1884, to which report there is no exception, and a statement made by Commissioner J. A. Preston, dated Oct'r 30th, 1884, and was argued by counsel.

Upon consideration whereof and it appearing to the court that there is now in the hands of said John W. Harris, special commissioner as aforesaid, the sum of $3,390.68 collected by him from Wm. Wyant, the purchaser of the land heretofore sold in these
228 causes, it is adjudged, ordered, and decreed that said commissioner do out of said sum of $3,390.68 pay the costs of the rule heretofore awarded against said Wyant, which costs are included in said sum of $3,390.68, and to Commissioner John A. Preston the sum of $6.00 for making the statement X X heretofore filed and referred to in these causes, for which no provision has been made, and that he distribute the residue amongst the parties entitled to the same and in the proportions mentioned in said statement X X as modified by said statement dated Oct'r 30th, 1884, and upon the

collection of the second deferred instalment of the purchase-money of the land aforesaid said Special Commissioner Harris shall distribute the same in the manner, to the persons, and in the amounts due to said persons as shown by said paper X X, and any payments made to or upon the orders of the attorneys of the said parties as shown by the decrees rendered and the proceedings taken heretofore in these causes shall be a proper acquittance of said special commissioner.

And at another day, to wit, at a circuit court held for Greenbrier, Co., at the court-house thereof, on the 7th day of November, 1885.

229 F. B. CHEWNING
vs.
JOHN F. COWAN *et al.*

and

A. G. GRINNAN
vs.
S. C. LONG *et al.*

These two causes came on to be again heard this 7th day of November, 1885, upon the papers formerly read, the motion of Wm. Wyant, by his counsel, for a continuance of said cause as to him, & arguments of counsel.

Upon consideration whereof it is adjudged, ordered, and decreed that said motion be sustained and said causes continued, and that said Wyant be, and he is hereby, required to execute before and file with the clerk of this court within sixty days from this date bond in the penalty of $3,500.00, with good personal security, to be approved by said clerk, conditioned to abide by and perform any order or decree that the court may hereafter render in these causes against him for the payment, in whole or in part, of the balance of purchase-money due from him for the land purchased by said Wyant under former decrees in these causes and for the costs of the proceedings in the rule awarded against him, or that the said Wyant, at his option and in lieu of giving said bond, shall within the said sixty days pay into the hands of Alex. F. Matthews, the general receiver of this court, subject to any future order or decree of this court against said Wyant upon said rule, the said balance of pur-
230 chase-money, to wit, the sum of $3,108.19, with interest thereon from the 12th day April, 1885, until so paid; and upon the execution and delivery of the bond or the payment into the hands of said receiver of the sum of money aforesaid said bond or said payment, as the case may be, shall have the effect of enjoining and restraining any proceedings for the enforcement of the payment or collection of said balance of purchase-money so due by said Wyant until the further order of this court or the judge thereof in vacation.

And at another day, to wit, at a circuit court held for Greenbrier county, at the court-house thereof, on the 1st day of November, 1886.

A. G. GRINNAN, &c.,
vs.
S. C. LONG & *als.*

and

F. B. CHEWNING
vs.
JOHN F. COWAN & *als.*

This day—1st day of November—the defendant John Halstead tendered his petition for a rehearing in these causes.

See pag- 1st for this order.

231 And at another day, to wit, at a circuit court held for Greenbrier Co., at the court-house thereof, on the 3rd day of November, 1886.

A. G. GRINNAN
vs.
S. C. LONG & *als.*

and

F. B. CHEWNING
vs.
J. F. COWAN & *als.*

The defendant John Halstead, sued in the above cause of A. G. Grinnan against S. C. Long and others, having presented his petition for a rehearing in these causes of the proceedings had therein, including the decree rendered on the 10th day of July, 1882, and the decree rendered on the 27th day of April, 1883, in pursuance of the statute in such cases made and provided, and the said petitioner having also presented with said petition an undertaking executed by John Halstead, A. Burlew, and J. W. Davis, as required by the statute, which undertaking is hereby approved, it is therefore ordered that said petition and undertaking be filed.

And thereupon the said John Halstead, by his counsel, tendered his answer to the bill of complaint against A. G. Grinnan filed in his said cause, and the court takes time to consider.

And at another —, to wit, at a circuit court held for Green-
232 brier county, at the court-house thereof, on the 10th day of November, 1886.

A. G. GRINNAN, in His Own Right & as Trustee, &c.,
vs.
S. C. LONG & Others

and

F. B. CHEWNING
vs.
COWAN & Others.

This 10th day of November, 1886, came the parties, and the defendant John Halstead presented his petition for the removal of these causes to the district court of the United States for the district of West Virginia, which court has circuit court powers, and with said petition filed a bond and asked to have said petition and bond filed and acted upon, and the court takes time to consider thereof.

And now, at this day, to wit, at a circuit court held for Greenbrier county, at the court-house thereof, on the 17th day of November, 1886.

233 A. G. GRINNAN
vs.
S. C. LONG

and

F. B. CHEWNING
vs.
J. F. COWAN.

These causes came on this 17th day of November, 1886, to be heard upon the petition of John Halstead, which had been tendered at a former day of this term, one of the defendants and a resident of the State of Pennsylvania, together with the bond accompanying said petition, asking that these causes be removed to the district court of the United States for the district of West Virginia, sitting at Charleston, in said district, and exercising circuit court powers, the objections of the plaintiffs to said petition and removal and the arguments of counsel. Upon consideration whereof it is ordered, adjudged, and decreed that said objections be, and they are hereby, overruled, and that said causes be removed to the district court of the United States for the district of West Virginia, sitting at Charleston, in said district, and exercising circuit court powers, together with the record thereof, and that no further proceedings be had herein in this court, and that the said surety and bond tendered by the petitioner, John Halstead, be accepted and approved.

234 In the Circuit Court of Greenbrier County, West Virginia.

To the Hon. H. A. Holt, judge of the circuit court of Greenbrier county:

The undersigned, who, by a decree rendered on the 10th day of July, 1882, in the causes of A. G. Grinnan *vs.* S. C. Long *et al.* and F.

B. Chewning *vs.* J. F. Cowan *et al.*, was appointed a com'r to make sale of the tract of land in the bills and proceedings in said causes mentioned as the Grinnan-Huddleston tract, begs leave to report that it became necessary, in order to sell said land to advantage, that a careful survey thereof should be made, which involved some time and expense, as well in having the land actually run and platted as in the examination of the records of Fayette county for title papers, the making of copies, &c., the matter being involved in considerable confusion.

The end abundantly justified this course, as your com'r thinks, for the survey showed the tract to contain 154⅛ acres, in addition to a tract of $9\frac{74}{160}$ acres on the southern boundary, which your com'r understands was claimed by the former owners as a part of the Grinnan-Huddleston tract, and which is not claimed by the
235 adjoining proprietor or any one else as far as he could understand. In view, however, of the fact that Surveyor H. J. Tucker reported to him that he could not make the calls of the Grinnan-Huddleston lands as run by him cover the said $9\frac{74}{160}$ acres your com'r did not deem it prudent to do more than sell the land as containing 154⅛ acres, announcing that a quitclaim deed would be made to the purchaser for the smaller tract. Accordingly the land was so sold on the 12th day of April, 1883, at Kanawha Falls, contiguous thereto, at public auction, your com'r having previously advertised the sale of said lands, as directed by the decree aforesaid, by publication in the Kanawha Gazette and Greenbrier Independent newspapers, and Wm. Wyant, being the highest bidder for said land, became the purchaser thereof at the price of $60.50 per acre, aggregating $9,324.56, of which he has paid in cash the sum of $3,108.18, and for the balance of which your com'r holds his two bonds for $3,108.19 each, payable, respectively, one and two years after date, with interest from date. (Note.—Owing to the amount paid in cash on the day of sale ($453.22) being more by $18.00 than was intended to be required when the bonds were drawn, each for
$4,444.67, a credit of $18.00 was entered upon the first of
236 them, and said Wyant, having subsequently elected to pay one-third of the entire purchase-money cash, sent your com'r a draft for $2,654.96, which was improperly credited by said Wyant on the first bond. This credit has been erased and so proportioned as to make the bonds as of the day of sale, $3,108.19 each, as above stated.)

Your comm'r thinks said sale a good one and recommends its confirmation.

Your com'r returns herewith a plat of the lands aforesaid and the report made to him by Surveyor H. J. Tucker.

Your com'r also submits herewith a statement of the costs of suit and expenses of sale, amounting to $450.59.

All of which is respectfully submitted.

JOHN W. HARRIS, *Com'r.*

April 26th, 1883.

NOTE.—Since closing said report Com'r Preston has made out a statement for the distribution of the above fund at the request of your com'r, and said statement, marked X X, is returned herewith.

JOHN W. HARRIS.

237 I, Jonathan Mays, clerk of the circuit court of Greenbrier county, W. Va., do hereby certify that the above is a true copy of the report of sale made by John W. Harris, com'r, in the ch'y causes of A. G. Grinnan *vs.* S. C. Long *et al.* and F. B. Chewning *vs.* J. F. Cowan *et al.* & now on file with the papers in said causes in my said office.

JONATHAN MAYS, *Clerk.*

NOTE.—The above report, note, and certificate is endorsed Grinnan *vs.* Long, &c., and Chewning *vs.* Cowan *et al.* Copy of report of sale. Fee, 75—and is inserted at this place in the foregoing record. L. B. Dellicker, clerk U. S. C. C., D. W. Va.

238 STATE OF WEST VIRGINIA, } *To wit:*
Greenbrier County, }

I, Jonathan Mays, clerk of the circuit court of the county and State aforesaid, do hereby certify that the printed record of these causes endorsed "Printed record, Jonathan Mays," together with this manuscript record, constitute the full record of the proceedings in the aforesaid two causes.

Given under my hand this 10th day of March, 1887.

JONATHAN MAYS, *Clerk.*

(Fee for this copy, $22.50.)

(See side page 554 for the record above mentioned.)

A copy of the printed record marked "Printed record, Jonathan Mays," referred to in the foregoing certificate, accompanies this record and is made part thereof. It is also marked "Copy of printed record. Filed May 4th, 1887. L. B. Dellicker, cl'k."

239 And at another day, to wit, at a district court of the United States for the district of West Virginia continued and held at Charleston, in said district, on Monday, the 23d day of May, A. D. 1887.

JOHN HALSTED
vs.
A. G. GRINNAN & Others. } In Chancery.

A. G. GRINNAN
vs.
S. C. LONG & Others. } In Chancery.

and

F. B. CHEWNING
vs.
J. F. COWAN. } In Chancery.

On motion of the plaintiff in the first-entitled cause, by his att'y, it is ordered that when these causes are matured they are to be heard together, and it is further ordered that any deposition or depositions hereafter taken in either of said causes shall be read and considered on the hearing of either or all of said causes, if desired by either of the parties, but this order is not to delay the hearing of either cause when ready by itself.

240 And at another day, to wit, at a district court of the United States for the district of West Virginia continued and held at Charleston, in said district, on Wednesday, the 25th day of May, A. D. 1887.

A. G. GRINNAN
vs.
S. C. LONG *et al.* } In Ch'y.

and

F. B. CHEWNING
vs.
J. F. COWAN *et al.* } In Ch'y.

On motion of John W. Harris, special commissioner in this cause, made in his own proper person, it is ordered that the petitioner, John Halsted, be required to complete the transcript of the record of these causes from the circuit court of the county of Greenbrier by causing to be copied and by filing in this court on or before the first day of the next term thereof a transcript of the record of the proceedings in said causes upon the rules awarded by said circuit court against William Wyant, including the answer of said Wyant and the exhibits filed.

241 The transcript of the record referred to and directed to be filed by the foregoing order is in the words and figures following, to wit:

To the Hon. H. A. Holt, judge of the circuit court of Greenbrier county:

The undersigned, special commissioner of your hon. court in the cases of F. B. Chewning *vs.* John F. Cowan *et al.* and A. G. Grinnan

vs. S. C. Long *et al.*, begs leave to report that the last instalment of purchase-money of the land purchased by William Wyant at a sale made by your com'r under decrees in said causes, and for which he holds the bond of said Wyant for $4,444.67, bearing date April 12th, 1883, and payable two years after date, with interest from date, subject to a credit of $1,336.48, April 26, 1883, as shown by a former report of your commissioner, became due, as it will be thus seen, on the 12th day of April, 1885, and has not been paid, but remains wholly unpaid.

Respectfully submitted.

JOHN W. HARRIS.

WEST VIRGINIA:

At a circuit court held for Greenbrier county, at the court-
242 house thereof, on the 20th day of April, 1885.

F. B. CHEWNING
vs.
JOHN F. COWAN *et al.*

and

A. G. GRINNAN
vs.
S. C. LONG *et al.*

John W. Harris, special commissioner of this court in the above-named causes, having this day filed a report showing that William Wyant has failed to comply with the terms of his purchase of the lands heretofore sold him under decrees of this court in said causes by paying the last of the bonds executed by him for the purchase-money of said bonds—

On motion of said special commissioner, a rule is awarded against said William Wyant, returnable here on the 30th day of this month, to show cause, if any he has, why the lands aforesaid should not be resold at public auction for cash to pay the last instalment of purchase-money due by him for said lands, for which instalment he executed to said commissioner his bond for $4,444.67, bearing date April 12th, 1883, payable two years after date, with interest from
date, subject to a credit of $1,336.48 April 26, 1883, and why
243 a decree should not be rendered against him for so much of said unpaid purchase-money as the lands upon a resale may not pay off and discharge.

Rule Against Wm. Wyant.

State of West Virginia to the sheriff of Fayette county, Greeting:

We command you that you summon William Wyant, if he be found in your bailiwick, to appear before the judge of our circuit court for Greenbrier county, at the court-house of our said county, on the 30th day of the April term, 1885, to show cause, if any he can,

why the lands heretofore sold him under decrees of this court in the chancery causes of F. B. Chewning *vs.* John F. Cowan *et al.* and A. G. Grinnan *vs.* S. C. Long *et al.* should not be resold at public auction for cash to pay the last instalment of purchase-money due by him for said lands, for which instalment he executed to Commissioner John W. Harris his bond for $4,444.67, bearing date April 12th, 1883, payable two days after date, with interest from date, subject to a credit of $1,336.48 April 26th, 1883, and why a decree should not be rendered against him for so much of said unpaid pur-
244 chase-money as the lands upon a resale may not pay off and discharge.

And have then there this writ.

Witness Jonathan Mays, clerk of our said court, at the court-house of said county, the 20th day of April, 1885, and in the 22nd year of the State.

J. MAYS, *Clerk.*

Answer of Wm. Wyant.

CHEWNING and Others
against
GRINNAN and Others.

Wm. Wyant, for answer to the rule awarded in this cause against him on the 20th of April, 1885, to show cause why the lands purchased by him under the decrees in said cause should not be resold for the unpaid purchase-money, respectfully shows:

1st. That the tract of 154⅛ acres was offered for sale by the acre by Com'r John W. Harris, and a plat of the same tract at the same time of sale exhibited by the said com'r to the bidders, a copy of which is filed with the papers of this cause and here asked
245 to be considered as part of this answer.

2nd. Respondent says that when said lands were so offered for sale and said plat exhibited to him as one of the bidders by said com'r, who represented it to correctly represent said land, respondent, upon the faith of said representations, bid in the said land at the price of $60.50 per acre, at which price the said parcel of land was knocked off to him and confirmed by the court.

3rd. That respondent made the cash payment of ⅓ of the purchase money and executed his bonds for the residue to said comm'r, as required by the decree of sale, and at the maturity of the first deferred instalment respondent paid the same in full.

4th. That afterwards, to wit, in February, 1885, to the great surprise of respondent, a summons in chancery issued from the clerk's office of the district court of the United States for the district of West Virginia and was served upon him to answer a bill filed against him and others in said court; a copy of which bill is herewith filed as Exhibit "A" and made a part of this answer.

246 5th. Respondent further says, as he is informed and believes, that by said bill the said Halstead seeks to recover a considerable and material portion of the said 154 acres tract, as will

fully appear by the reading of said bill in connection with a correct plat of said lands, filed herewith as Exhibit "B."

6th. Respondent further says that he is informed that the lines of the said 154 acres tract were well marked, as laid down in the plat by which the sale was made, and had been recognized and treated both by the said Halstead and those under whom he claims and also by the said Grinnan and those under whom he claims as the true lines from 1859 until the beginning of this suit, and respondent had no knowledge whatsoever at the time of his said purchase or at the time of the confirmation of sale or at the time of paying the first deferred instalment or at any time prior to the serv-
247 ing of the said summons of any fraud or mistake in the making of the divisions here mentioned in said bill or any controversy or question concerning the same.

7th. Respondent further says that he is not further advised of the said Halstead claims and proofs than appears from the said bill and exhibits, and has taken steps to concert his defence to said suit; that at this time it is impossible to foretell its results, but should said Halstead succeed in disturbing said division line, while the exact extent of the loss to said tract cannot now be foretold, it is apparent that a large and material portion of said tract will be lost to respondent, and especially that portion of said 154 acres wherein the coal is found.

8th. Respondent further says that said tract is only valuable for its coal; that coal in paying quantities is only found on the back part and in less than ½ of the tract, and that the coal on the
248 back part of said tract put in question by said suit was the chief inducement to said purchase and to the high price per acre bid by respondent for the tract, and that if the said division line should in said suit be made to bind upon the Forest Hill tract upwards of (—) acres of the most valuable portion of said tract will be lost to respondent; by reason of which respondent is advised and believes that if the said Halstead is successful in the said suit respondent will be entitled to an abatement of the purchase-money to the extent of the value of the lands thus lost, which will certainly be a very large sum and possibly the full amount of the last deferred instalment.

9th. Respondent further says that if the said Halstead is entitled to the relief prayed for in said bill there has been a mutual mistake as to the quantity of land in said tract by the court, said com'r,
249 and respondent, and that he had no knowledge whatsoever before the service of the summons aforesaid of any of the facts set out in said bill, and has not by acquiescence, lauches, or other circumstance waived his right to an abatement of the purchase-money in the premises; and the respondent believes and charges that neither the court nor the commissioner at the time of the sale or at the time of the confirmation thereof had any knowledge of the facts claimed as a ground of relief in said bill.

10th. Respondent further says that of the purchase-money of the aforesaid tract, to wit, $9,324.56, he has paid $6,216.37, and that the deferred instalment remaining unpaid is secured by the first lien on

the said land and the bond of respondent, and is perfectly secure; while, should said moneys be collected and disbursed among the numerous creditors according to the decrees entered in this cause, there will be no fund — which respondent can be reimbursed
250 for the loss he would sustain by a recovery in said suit by said Halstead.

Wherefore respondent prays that the collection of the said deferred instalment of purchase-money be postponed till the decision of the suit aforesaid by the said Halstead against respondent and others, and the amount of the abatement, if any, to which respondent is entitled be fixed and determined; all of which is most respectfully submitted to the court.

STATE OF WEST VIRGINIA, *County of Fayette,* } *To wit:*

Wm. Wyant, defendant named in the foregoing answer, being duly sworn, says that the facts and allegations therein contained are true except so far as they are therein stated to be on information, and that so far as they are therein stated to be on informa-
251 tion he believes them to be true.

WM. WYANT, *Defendant.*

Taken, sworn to, and subscribed before me this 28th day of April, 1885.

THOS. W. WHARTON,
Notary Public, Fayette County, West Virginia.

At another day, to wit, at a circuit court held for Greenbrier county, at the court-house thereof, on the — day of ——, 1887.

A. G. GRINNAN
vs.
S. C. LONG *et al.*
and
F. B. CHEWNING
vs.
J. F. COWAN *et al.*
} Order in Ch'y.

The rule awarded in these causes on a former day of this term against Wm. Wyant having been returned executed, it is ordered that the same be docketed.

252 And, on motion of the said Wm. Wyant, he has leave to file his answer to said rule, which is filed accordingly and to which the plaintiff in said rule replies generally, and these causes are continued until the next term.

Surveyor H. J. Tucker's Report.

Survey of the A. G. Grinnan lands, lying in Fayette county, W. Virginia, below Armstrong creek, on Kanawha river, made for Jno. W. Harris.

I began at a pine and pine stump on a ridge (see corner marked "7" on map) shown me by Wm. Jarrett as the corner

of the Huddleston 200-acre tract, thence I ran by the calls of a survey made by T. S. Robson for Forest Hill M. & M. Co. (see copy marked "A") S. 32½ E. 10 poles to "2"— a stake called for was not found; N. 56° 27′ E. 126 poles to "3," a point on a north hillside—a lynn, maple, dogwood, and ironwood called for were not found, variation 1° 12′; N. 80° 12′ E. 107 poles to a pine, chestnut, and gum in a point of a ridge at "4," variation 12′ and 23 poles over the distance called for; N. 61° 12′ E. 225½ poles to "5," a
253 point on the bank of Kanawha river, variation 1° 12′ and 18½ poles short of the distance called for.

Beginning again at "2," I ran by the calls of a deed from G. P. Huddleston to A. G. Grinnan (see copy marked "B") S. 32½ E. 38½ poles to a poplar on a dividing ridge at A, variation 30′ and 10½ poles over the distance called for; thence, allowing 3° variation, I ran N. 41 E. 40 poles, N. 18 E. 10 poles, N. 71 E. 32 poles, N. 38 E. 28 poles, N. 76 E. 14 poles, S. 79 E. 88 poles, S. 57 E. 16⅔ poles. This line was about to leave the top of the ridge and I had to stop at the end of the above distance to avoid doing so, N. 73 E. 32 poles. (I extended this line 2 over the distance called for so as to reach some marked trees and at the same time to remain on top of the ridge in the next course), N. 16 E. 30 poles, N. 53 E. 16 poles, N. 33 E. 30¾ poles. (I extended this line 2¾ poles over the distance called for the same courses as that mentioned above), S. 82 E. 52 poles, S. 47 E. 80 poles, down the mountain to "18;" thence N. 12 E. 115 poles to "19." No corner trees are called for in the deed of Huddleston to Grinnan at "19,"
254 but in the deed of Brannan to Edwards (see copy marked "C") a sugar tree, beech, and buckeye were called for at or near that point, but they were not found; thence with the calls of deed Brannan to Wm. M. Edwards S. 77 E. 30½ poles to a beech on the bank of the Kanawha river at "20," corner to a tract of 57 acres granted to George Richards, variation 46° & 4½ poles over the distance called for. The corners "N" and O being gone, I know of no method of fixing the point at "19," called for by Brannan, except the one I have adopted—that is, to do so by the Grinnan calls. If the corner "19" is the true corner of the Brannan 15-acre tract the Brannan call, "N. 57 E. 26 poles," cannot reach the beech at "20," which is the corner of the Richards 57 acres. The words "and with" preceding the call "N. 57 E." seem to indicate that the beech must have been a corner of both the 57 acres and the Brannan 15-a. tract. In addition to this the beech at "20" is generally regarded as a corner of Grinnan's by those who ought to know, according to the best information that I can get. Said beech is defaced to such a degree that I cannot distinguish corner marks on it. The next call
255 of the Brannan 15-acre lot is "same line to low-water mark in the said Great Kanawha river." But in the original survey of the Brannan 32½ acres the next call from the beech was "N. 3 W." I allowed 3° variation and ran north 8 poles to the edge of Kanawha river (see corner "21"), thence N. 35 W. 64 poles to "5." I then began at the beech at "20" and, reversing on the calls of deed Jas. Montgomery, ex., to Wm. Bustee (see copy "D"), I ran S. 35 W.

31 poles to a large sugar tree and sugar-tree stump on the hillside at "M," variation 3° and 3 poles short of the distance called for; thence reversing on the last call of said deed S. 25 W. 88 poles to "18," variation 1°. The entire call or distance was not run out.

The Bustee calls (see copy marked "E"), by allowing 3° variation, run with the red lines from the poplar at "A" to a large double chestnut that answered the description given in the notes at "B." The last line, however, or the line J B would run N. 46 E. 50 poles instead of N. 44 E. 52 poles. From "B" I mapped the lines to K and L without running.

256 The Brannan 15 acres is embraced within the lines beginning at O, thence to "N" and to "19," "20," "21," and down and with the river to about the point "P" and back to "O." It appears that its corner trees are all gone; therefore it would be difficult to define the true limits. I do not believe, however, that it contained as much as 15 acres.

H. J. TUCKER, *Surveyor.*

EXHIBITS A, B, C, D, AND E OF SURVEYOR TUCKER'S REPORT.

"A."

Copy of Robson's Survey Made for Forest Hill M. and M. Co.

Beginning at a sycamore opposite the head of Wheeler's island S. 55¼ W. 460 poles to two pines on a ridge S. 33 E. 10 poles to a stake, N. 55¼ E. 126 poles to a lynn maple dogwood and ironwood on a north hillside N. 80 E. 84 poles to a pine, gum and chestnut on a point of a ridge N. 60 E. 244 poles to a beech on the bank of the river N. 35 W. 70 poles down and with the river to

257 the beginning. Containing 105 acres.

Oct. 14, 1859.

B.

G. P. Huddleston to A. G. Grinnan. } Deed. Book E, page 452.

Conveys 200 acres of land lying below the mouth of Armstrong creek bounded as follows:

Beginning at a sycamore opposite the head of Wheeler's island and running south 55¼ W. 460 poles to two pines on a ridge corner to Paxton thence S. 33 E. 38 poles to a poplar on a dividing ridge corner to Bustee's heirs' land thence with the top of said ridge and Bustee's lines N. 38 E. 40 poles N. 15 E. 10 poles N. 68 E. 32 poles N. 35 E. 28 poles N. 73 E. 14 poles S. 82 E. 88 poles S. 60 E. 23 poles N. 70 E. 30 poles, N. 13 E. 30 poles, N. 50 E. 16 poles N. 30 E. 28 poles S. 85 E. 52 poles S. 50 E. 80 poles N. 9 E. 115 poles N. 28 W. 85 poles to a lynn corner thence N. 10 E. 11 poles to a beech on Kanawha river thence down said river N. 35 W. 36 poles to beginning.

258 Ex. "C."

L. H. Brannon to Wm. W. Edwards. } Deed. Book D, page 448.

Conveys 15 acres more or less of land bounded as follows: Beginning at a large beech on the south bank of the Great Kanawha river on a line of the G. Richards survey and with the same S. 6 W. 12 poles to two white lynns corner to Richards' & Gallatin's surveys thence with the latter S. 31° E. 84 poles to a sugar tree beech and buckeye on a line of a survey made for Richards and with N. 57 E. 26 poles to an ash and beech on the bank of the river thence on the same line to low-water mark in the said Great Kanawha river thence down and along the same at low-water mark to a point opposite the place of beginning thence S. 6 west up the south bank to the place of beginning containing 15 acres be the same more or less

June 9th 1853

The above tract conveyed by Wm. H. Edwards to W. H. Smith 7th Octo. 1857 and said deed refers to a deed conveying said
259 land by Wm. W. Edwards to W. H. Edwards on 24th Oct. 1853. See Book E page 88. W. H. Smith conveyed the above 15 acres to A. G. Grinnan Octo. 29th 1857. See Book — page 84.

Ex. "D."

Jas. Montgomery, ex., to Wm. Bustee. } Deed. Book D, page 101.

Conveys 57 acres which was granted to Geo. Richards March 14th 1825 and bounded as follows Beginning at two large sugar trees on the hillside below Armstrong creek N. 32 E. 34 poles to a beech and hornbeam trees on the banks of Kanawha river thence up the same S. 43 E. 54 poles crossing Armstrong creek to a double sycamore between the river and the creek corner to 250 acres thence with lines of same * * * N. 45 W. 24 poles to two white oaks on a hillside thence N. 24 E. 176 poles to beginning,

March 31st 1859.

Ex. E.

Partition of Bustee lands by Loomis Book "D" 608.— * * *
The Buscan survey begins at a beech supposed to be the
260 corner of the Gallatin survey and marked by Gen'l Beckley as such N. 49½ W. 360 poles to a poplar chestnut and chestnut oak on the top of the mountain then with the top of the mountain N. 20 E. 12 poles N. 41 E. 40 poles, N. 70 E. 26 poles N. 39 E. 38 poles S. 77 E. 32 poles S. 86 E.

90 poles N. 73 E. 20 pls. N. 10 E. 32 poles N. 41 E. 52 poles to a large chestnut & double chestnut on the top of *of* the mountain commanding a view of the river above and below (see corner marked B on red lines — Tucker) S. 58 E. 74 poles to chestnut & chest. oak S. 16 E. 12 poles S. 58 E. 110 poles to walnut * * *

The above notes are taken from a survey made in partitioning the Bustee land by Surveyor Loomis in March and April, 1852.

H. J. TUCKER.

And at another day, to wit, at a circuit court held for Greenbrier county, at the court-house thereof, on the 8th day of November, 1884.

261 A. G. GRINNAN *vs.* S. C. LONG *et al.*

and

F. B. CHEWNING *vs.* J. F. COWAN *et al.*

These two causes came to be heard together this 8th day of November, 1884, upon the papers formerly read, the report of collections made by Jno. W. Harris, sp'l com'r in these causes, dated Nov. 1st, 1884, to which report there is no exception, and a statement made by Commissioner J. A. Preston, dated Octo. 30th, 1884, and was argued by counsel.

Upon consideration whereof and it appearing to the court that there is now in the hands of said John W. Harris, special commissioner as aforesaid, the sum of $3,390.68, collected by him from Wm. Wyant, the purchaser of the land heretofore sold in these causes, it is adjudged, ordered, and decreed that said commissioner do out of said sum of $3,390.68 pay the costs of the rule heretofore awarded against said Wyant, which costs are included in said sum of
262 $3,390.68, and to Commissioner John A. Preston the sum of $6.00 for making the statement X X, heretofore filed and referred to in these causes, for which no provision has been made, and that he distributed the residue amongst the parties entitled to the same and in the proportions mentioned in said statement X X as modified by said statement dated Oct. 30th, 1884, and upon the collection of the second deferred instalment of the purchase-money of the land aforesaid said Sp'l Comm'r Harris shall distribute the same in the manner, to the persons, and in the amounts due to said persons as shown by said paper X X, and any payments made to — upon the orders of the attorneys of the said parties as shown by the decrees rendered and the proceedings taken heretofore in these causes shall be a proper acquittance of said special commissioner.

STATE OF WEST VIRGINIA, *Greenbrier County,* } *To wit:*

I, Jonathan Mays, clerk of the circuit court of Greenbrier
263 county & State aforesaid, do certify that the foregoing transcript, together with those portions of the record heretofore certified to the district court of the United States for the district of West Virginia, constitute a complete record of everything required by the parties to be copied in the cases of F. B. Chewning against John F. Cowan *et al.* and A. G. Grinnan against S. C. Long *et al.*, removed to said district court from said circuit court.

Given under my hand this 16th day of September, 1887.

JONATHAN MAYS, *Clerk.*

(Fee of clerk circuit court, Greenbrier Co., for this record and map, $7.50.)

The following is a copy of the map attached to the foregoing record:

(Here follows map marked p. 263*a*.)

264 *Depositions.*

The following depositions were taken and filed in said cause:

265 Deposition of John Halsted, filed on the 21st day of April, 1887.

Notice to Take Depositions.

To A. G. Grinnan, William Wyants, and others:

Take notice that on the 17th day of April, A. D. 1887, between the hours of 9 o'clock a. m. and 6 o'clock p. m., at the "Mansion house," Mauch Chunk, State of Pennsylvania, I will take the deposition of John Halsted and others, to be read as evidence in my behalf in a certain suit in chancery now pending in the district court of the United States for the district of West Virginia, in which suit I am plaintiff and you & others are defendants. If from any cause the taking of said depositions shall not be commenced or completed on the day aforesaid, the same shall be continued from day to day or from time to time at the same place and between the same hours until the same shall be completed.

JOHN HALSTED.

A. BURLEW, *Att'y.*

266 Service accepted of the within notice for Wm. Wyant.

J. F. BROUN, *Att'y.*

Service accepted for the Forest Hill Mf. Co. and Robert Soutter, trustee.

A. BURLEW.

Service accepted of the within notice as atto's for A. G. Grinnan.

MILLER & GALLAHER.

by, did the Forest Hill Mining and Manufacturing Company take of this land and how long did such possession continue,
269 whether broken or continuous, and what use did said company make of said land during the time said company was

JOHN HALSTED
vs.
A. G. GRINNAN & Others } In Chancery. Pending in U. S. District Court, Charleston, W. Va.

Notice of the taking of the deposition- of John Halsted & others in the above-entitled cause having been given by the complainant and accepted by us that the said depositions would be taken at the "Mansion house," at Mauch Chunk, Penn., on the 17th day
267 of April, 1887, and on attention having been called to the fact that the 17th of April is Sunday, it is hereby agreed that the said depositions may be taken on the 18th of April, 1887, at the place designated in said notice.

April 9th, 1887.

J. F. BROUN,
Att'y for Wm. Wyant.
MILLER & GALLAHER,
Atto's for A. G. Grinnan.
A. BURLEW,
Att'y for Forest Hill M. & M. Co. & Robert Soutter, Trustee.

JOHN HALSTED
vs.
A. G. GRINNAN *et al.*

The officer before whom the deposition of John Halsted is taken in the above cause will file with said deposition and propound to said Halsted the following interrogatories in behalf of the plaintiff in said cause.

A. BURLEW, *Att'y.*

First question. State your age and place of residence.

Second question. State whether or not you are the plaintiff
268 in the above-entitled cause, now pending in the U. S. district court at Charleston, West Va.

Third question. State when you first became interested, if at all, in the Forest Hill Mining and Manufacturing Company, set out and referred to in the plaintiff's bill, and in what way you became interested in said corporation and to what extent.

Fourth question. The bill refers to a deed made by W. K. Smith and wife, A. G. Grinnan, George B. Grinnan, & A. G. Grinnan, trustee, to the Forest Hill Mining & Manufacturing Company, dated the 15th day of June, 1859, for two thousand acres of land lying in Fayette county, West Virginia; also a certain tract of land known as the "Huddleston tract," to be surveyed off the western side of said tract by a line running from the northerly to the southerly side of said tract, to be bounded on the south by the said two-thousand-acre tract and on the north by the Great Kanawha river, and containing one hundred acres, more or less. What possession, if any, did the Forest Hill Mining and Manufacturing Company take of this land and how long did such possession continue,
269 whether broken or continuous, and what use did said company make of said land during the time said company was

the owner of the same? State also when you first visited said lands, how familiar you became with them, and the interest you took in them.

Fifth question. At the time of making said purchase by said company, what was the supposed number of acres in the said Huddleston tract, and what was the object of purchasing the one hundred acres, "more or less," to be surveyed off the western side, as described in the previous question?

Sixth question. From the time you became the purchaser of this land on the 6th day of May, 1864 (as appears by the copy of the deed filed with your bill marked "Ex. E"), what possession, if any, have you had of this land—I mean the whole land conveyed in said deed, the kind of possession, and whether continuous or broken; whether or not you have had a tenant on the land; and, if so, who and where located? State also whether or not you have paid
270 the taxes on the land during the time you have owned it; and, if so, whether on the whole of the land conveyed to you by said deed or only a part of it.

Seventh question. State whether or not the said company or you ever had the said "Huddleston" tract partitioned and laid off by surveying the same by actual survey; and, if not, state to what extent, if any, the westerly part of said tract, as called for by the deed to the said company, was ever partitioned to you or said company by actual survey.

Eighth question. Do you or did you know a man by the name of —— Eams? If yea, state whether or not he ever had any authority to represent or bind the said company to the laying off the part of said "Huddleston tract" purchased by said company, as stated above, in a different manner from the calls specified in its said deed.

Ninth question. State whether or not the said Eams ever
271 made any representations to said company or to any one connected therewith that he was ever present with any surveyor when that portion of the Huddleson tract was laid off to said company, and that he had acquiesced or consented to the laying off the same in anywise in violation to the calls in the said deed from Grinnan & others to the Forest Hill Mining and Manufacturing Company.

Tenth question. What is the character of said land, and in what does — chief value consist?

Eleventh question. What part of said land has been under fence and cultivation, and from what time?

Twelfth question. What occasion has the Forest Hill Co. or you had to make a survey of said land and partition the Huddleston tract from the time of the Co.'s purchase in 1859, except the running of that portion of the line from the Kanawha river a short
272 distance back, and what was the necessity to run this part of the line?

13th question. What actual possession or claim has A. G. Grinnan had or made to any part of the said land conveyed by him to said company by deed as stated in the foregoing questions?

14th question. What actual possession has said Grinnan had to that part of said Huddleston tract which he did not convey to said company; whether continuous or broken, enclosed or uninclosed?

15th question What notice, if any, did the defendant, William Wyants, have of the land conveyed to you by the deed to you for the same, referred to in the former questions, at the time he made the purchase of a part of them as set up in his answer filed in this cause?

16th question. If the said Wyants did not have actual notice except as given by the recordation of the deed referred to above, could he have ascertained the land embraced in the said deed to the said company or in the said deed to you by using reasonable diligence?

273 17th question. State whether the said Eams is now living or not.

18th question. A. G. Grinnan says in his answer filed in this cause "that the Forest Hill Mining & Mf. Co. was gotten up by Judge J. F. Cowan, & that he charges and believes that said Halsted was a member & subscriber of said company & held about one-tenth of the stock therein, & that at the time of the conveyance by respondent to said company the members thereof and this respondent sent a nephew of said Judge Cowan to Fayette county, West Virginia, to lay off the said one hundred acres from the remainder of the tract, and that his name was John McKenney, and that he went to Fayette county as the agent of John Halsted, the complainant, & others, & of respondent, and as such agent he did engage T. S. Robson as surveyor and did lay off or have laid off the one hundred acres of the Huddleston tract, and that he, respondent, was not present and had nothing to do with laying off said dividing lines, and that two members of said Forest Hill Co. were present; that said

274 McKenney directed the laying off of said dividing lines, and that the plat of said one hundred acres was returned to the members of the Forest Hill Company in New York city, and that they approved of the action of their agent & took possession of the 100 acre tract & held it by its lines separate and distinct from the other part of the Huddleston tract and built houses on it in about the year 1859; and during this long interval from that year to about this time your respondent has never heard of any claim that the lines were incorrectly run, and that he has held undisputed possession of the said remaining part of said Huddleston tract for more than twenty years, and any claim such as is set up by the complainants is barred by act of limitation."

What have you to say to this part of Grinnan's answer? How much is true and what part is untrue?

275 19 question. The said Grinnan states also in his said answer as follows: "That said Forest Hill Co. made a small payment to him (Grinnan) & executed a number of coupon bonds for deferred payments, secured by deed of trust on the 2,000-acre and the 100-acre tracts; that said company did not pay said coupon bonds, * * * & that complainant Halstead bought some of them; &, in 1864, during the late war * * * & when respond-

ent could not intervene and protect himself or those he represented, said Halsted did have the said 2,000 acres and said 100 acres sold in New York city by Robert Soutter, trustee, & did buy the same * * * for the small sum of forty-eight hundred dollars." State what you have to say about this part of said Grinnan's answer. What part is true and what part is untrue?

20th question. The said Grinnan says also in his said answer
" that at the time of the purchase by said Halsted he had a
276 map of said 100-acre tract as laid off by his agent, McKenney, showing the lines and courses, and that in or about the year 1870 he showed said map or plat to this respondent, and that he took possession of said 100-acre tract & placed a Dr. Hale as his agent & held possession thereof only by the lines of said map or plat, a copy of which, marked B, is herewith filed, &c., &c.; and, though respondent was frequently in Fayette Co. & at Dr. Hale's house, &c., he, as agent of Halsted, never claimed any part of said 125-acre tract (the remaining part of the Huddleston tract) or anything beyond the lines of said map or plat, and that Halsted bought the tract with full knowledge of the dividing lines." The following is a copy of said map filed with said answer as near as it can well be drawn. What have you to say to this part of said answer? What part is true & what part is untrue?

21 question by same. The said Grinnan says also in his
277 said answer " that in or about the year 1875 he did file a bill in chancery against Cowan, Long, & others in Fayette circuit court, & that in an amended bill he made John Halsted a defendant & did inform him of the fact, & that the case was removed to Greenbrier circuit court, and that under that suit * * * the 125 acres aforesaid were sold to Wm. Wyants," &c.

What have you to say to this part of said answer? What part is true & what part is untrue?

22nd question. When did you first ascertain that the plot of the land—the 2,000 acres and the 100 acres, more or less—made by T. S. Robson was not made in conformity with the deed from Grinnan & others to the Forest Hill Co., nor in accordance with the deed from Soutter, trustee, to you (the deeds referred to in several of the foregoing questions)?

23rd question. State what correspondence, if any, you had with
A. G. Grinnan concerning the strip of land, lately claimed
278 by said Grinnan, lying between your " Huddleston " tract and the Forest Hill tract of 2,000 acres, about the year 1880.

State also whether or not at that time you knew that the map or plat of the land made by T. S. Robson was not made in accordance with your deed. State all about the facts and circumstances concerning the correspondence, and state whether or not you ever conseded to A. G. Grinnan any right to any strip of land lying between your 100-acre tract, " more or less," and the Forest Hill 2,000-acre tract, so as to separate those two tracts, after you understood the calls of your deed to call for these two tracts to bind on each other.

24th question. State what intent the said A. G. Grinnan has ever expressed, in word or deed, of holding any portion of the land con-

No. 370.
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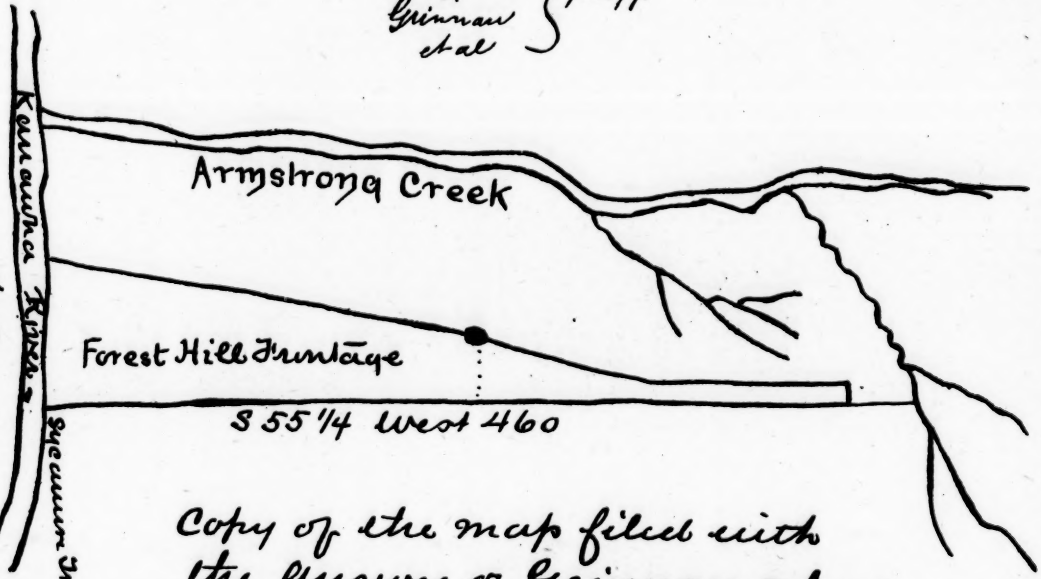
et al
} p. 279.



Copy of the map filed with the answer of Grinnan, referred to in the 20th question

A. Boykin, counsel for John Halstead.

veyed to you as stated in the foregoing questions adverse to you & when such expression was first made.

25th question. State whether A. G. Grinnan ever claimed
279 any such strip of land as referred to in the last question; if so, for what period of time and whether or not said Grinnan has ever had any actual adverse possession to you to such strip of land.

26th question. State anything else and file any papers in your possession which you may regard pertinent to this cause.

(See diagram marked page 279.)

A. BURLEW,
Counsel for John Halsted.

280 In the District Court of the United States for the District of West Virginia.

JOHN HALSTED *vs.* A. G. GRINNAN *et al.* } In Chancery, at Charleston, West Virginia.

STATE OF PENNSYLVANIA, *Eastern District of Pennsylvania, County of Carbon,* } *ss:*

JOHN HALSTED, a witness called on behalf of the plaintiff herein and residing in the borough of Mauch Chunk, county of Carbon, State of Pennsylvania, more than one hundred miles from the place where this cause is to be tried, being duly cautioned and sworn to tell the whole truth and being carefully examined, deposes and says as follows:

1. In answer to first interrogatory in above-stated case hereto attached, deponent says:

281 I am sixty-seven (67) years of age, and reside in Mauch Chunk, Carbon county, State of Pennsylvania.

2. To second interrogatory deponent answers:

I am.

3. To third interrogatory deponent answers:

I became interested in the corporation referred to after the conditions of the purchase of the property had been agreed upon, and I think it was about the month of June, 1859, when I subscribed for about one-tenth ($\frac{1}{10}$) part of the stock. One of the conditions for the payment of the property by the Forest Hill Company was the issue of three series of bonds of five hundred (500) dollars each, fourteen thousand dollars payable in three years from date, thirteen thousand dollars in five years from date, and thirteen thousand in eight years. I subsequently purchased several of the first and second ("First & second" inserted before signing.—L. H. B.) series of bonds from William K. Smith, and in about July, 1860, he proposed to sell me all of the bonds of the second and first series held by himself and A. G. Grinnan, one of the defendants, mak-

ing fifty-one in all, so that I held all of these series
282 of bonds that were issued except three. As to the eight-year bonds he said he did not regard them as of any value, but that J. F. Cowan, their agent for the sale of the property, thought he could realize something out of them for himself. William K. Smith had previously admitted to me that the price paid for the property was more than its market value.

During a period of several months prior to the abandonment of the property by the Forest Hill Company I also advanced various sums of money to meet its obligations, amounting in the aggregate to between four and five thousand dollars. It may be asked why I put so much money into this venture. My reply is that I first became interested in it through the urgent solicitation of Dr. Charles F. Hale, and after the company had examined the property and had made some progress in erecting their works their reports were very favorable as to the valuable coal deposits and were
283 greatly encouraged as to the ultimate success of the undertaking, but the unlooked-for delays and the increased cost beyond the original estimate convinced me that however profitable it might eventually prove to be the company would not be in a position to pay off its first and second series of bonds at maturity, and to avoid the risk of losing every dollar that had been put into the venture I thought the only safety was in getting control of the bonds referred to. As to my subsequent advances made to the company, which were a total loss, I felt that labor and supplies should be paid for, and in fact there should be no impairment of the company's credit when there was a prospect of realizing from the sale of its product, which was said to be so near at hand, but the discovery of petroleum and its use and the war troubles blocked further progress and the company was obliged to abandon the property, which was left uncared for until 1864. Meanwhile no interest had been paid on the bonds, so that I was obliged to insti-
284 tute such legal proceedings as were necessary to have the property sold, hoping to realize enough to make me whole on them, referring to the bonds previously mentioned, but I was obliged to buy it or lose all. I also paid several hundred dollars of the company's outstanding debts for labor after I took possession of the property.

4. To the fourth interrogatory deponent answers:

The Forest Hill Company were in possession of the property from about the month of July, 1859, to the spring of 1861, when they were obliged to abandon it on account of the war, and after that they took no further interest in it. They erected works for the purpose of manufacturing coal oil. Their intention was also to mine and ship coal when it could be made profitable to do so. My first visit to Forest Hill was in the summer of 1860. I think I remained there about two weeks. I remember Richard M. Eames tell-
285 ing about Estep, the bee-hunter, and of his asking permission to occupy a patch of ground in Tucker hollow, and, the president being absent at the time, he gave him the privilege to do so, as he thought it would be protection against timber thieves. This

circumstance impressed itself upon my mind by the interesting account he gave me of bee-hunting.

5. To the fifth interrogatory deponent answers:

The Huddleston tract was said to contain about two hundred (200) acres, one-half of which was sold to the company for a frontage to the two-thousand-acre tract behind it and to afford an outlet for its coal product; also to afford *to*the necessary building space for the erection of its works and dwelling-houses for the accommodation of the workmen employed by the company.

6. To sixth interrogatory deponent answers:

I have held undisputed possession of the property conveyed
286 to me by the trustee's deed as described by the calls in Forest Hill Company's deed from William K. Smith and A. G. Grinnan until after the sale of what is known on Robson's map as the Elk Ridge front, and Dr. Charles F. Hale has made his home there since the year 1864. His residence is located on the westerly half of what was formerly known as the Huddleston tract, fronting Kanawha river. I have always paid my taxes promptly on the number of acres specified in the deed.

7. To seventh interrogatory deponent answers:

When the Forest Hill Company took possession, in 1859, I was told that Robson ran the lines for the purpose of laying off the westerly half of the Huddleston tract so that they would know where to locate their buildings. I don't know of anything more being done until Robson surveyed the entire tract, as is shown by his map dated 1861.

8. To eighth interrogatory deponent answers:

287 I know a man by the name Richard M. Eames. Neither he or any one else had any authority to represent or bind the company in laying off the tract in a different manner from the calls specified in the said deed.

9. To ninth interrogatory deponent answers:

Never to my knowledge.

10. To tenth interrogatory deponent answers:

The property is altogether mountainous, and its chief value consists in coal, iron ore, and timber.

11. To eleventh interrogatory deponent answers:

That part of the frontage occupied by Dr. Charles F. Hale.

12. To twelfth interrogatory deponent answers:

I know of no reason for running the line so far back at that or at any time except to connect it with the main tract. When William Wyant erected coke ovens on the adjoining property, nine years ago, on leased land, he built a dwelling-house which extended over the Forest Hill line. Dr. Hale remonstrated with him and he at last changed it slightly, but he insisted on holding onto a part
288 of it. The line had never been disputed by the owners of the property on which he held a *lean*, but notwithstanding that and the fact that he controls about a mile of frontage he is persistently claiming something more.

13. To thirteenth interrogatory deponent answers:

He has none whatever.

14. To fourteenth interrogatory deponent answers:

I believe he was part owner, but he had no tenant on the land nor was any part of it enclosed.

15. To fifteenth interrogatory deponent answers:

Mr. Wyant did not receive any actual notice from me for the reason that I had no knowledge of the property being offered for sale, nor did I know of his intention to buy the property or that it had been sold until some time afterwards.

16. To sixteenth interrogatory deponent answers:

Yes; the deed of the property has been on record over twenty years.

289 17. To seventeenth interrogatory deponent answers:

I believe Richard M. Eames is living.

18. To eighteenth interrogatory deponent answers:

At the time the Forest Hill Company was organized I believe John F. Cowan was represented as holding one-tenth interest in the venture, but his interest ceased in some way—I do not know how—very soon after the other members of the company made their first payment. He was also the agent through whom Smith and Grinnan sold their property to the Forest Hill Company. Whether he paid his share of the first instalment I do not know; perhaps A. G. Grinnan can tell. I was informed of John McKinney being sent to Forest Hill to point out the locality of the property to the representatives of the company and to authorize the surveyor to divide the Huddleston tract in such a manner as to connect the westerly half with the two-thousand-acre tract as shown on the Salisbury map so as to give free access to it. John McKinney was not

290 an agent of the company, but he was in every sense of the word the agent only of Smith & Grinnan, sent by them to order such survey as was necessary to complete their part of the contract in order to give possession of the property to the company, and he had no authority from the company to give such directions to the surveyor as to cause a failure of compliance with the calls of the deed. I have no knowledge of the said plat being returned to the Forest Hill Company in New York, nor do I see how they could have expressed their approval of it unless it showed actual connection with the back lands according to the calls of the deed, as it was not intended to be held separate and distinct from the Forest Hill main tract.

19. To nineteenth interrogatory deponent answers:

All the conditions of payment by the Forest Hill Company to Smith & Grinnan were fully complied with before the delivery of the deed to them, in 1859. The property was sold in 1864 by order of the court, in strict compliance with the terms of the trust

291 deed, and I did not consider that any interest would be benefited by a further postponement of the sale.

20. To twentieth interrogatory deponent answers:

I always regarded the failure of the survey to connect the two tracts as the result of carelessness and the loose manner of doing such work on wild land of that character, which at that time was not of much value, and that the space between the two tracts was

so small that it would be of no use to anybody but the owner of Forest Hill, to which the deed signed by William K. Smith and A. G. Grinnan is supposed to be a guarantee against fraudulent claimants; another thing, A. G. Grinnan having a full control of the adjoining tract, which he designated on Robson's map as a part of Elk Ridge, through which the deed grants a right of way, which right I always supposed applied to this tract also. These facts, together with my good faith in A. G. Grinnan's integrity and his sense of justice regarding the rights of others, and especially to one who had paid him sixty per cent. of the par value of his bonds, that
292 proved to be almost worthless—under these circumstances I felt that my right to that strip of land could never be disputed by anybody, and especially by A. G. Grinnan, and it never occurred to me to look over the Smith and Grinnan deed till after the sale of the property to William Wyant. I then found for the first time that the right of way did not apply to the front tract, and I at once wrote to A. G. Grinnan calling his attention to the matter, in the utmost confidence that he would acknowledge that it was an oversight on the part of the surveyor, and that he would have it corrected before the sale to Wyant was ratified; but, to my utter surprise, he refused to do anything and pleaded as an excuse the default of the Forest Hill Company in the payment of its bonds, that William K. Smith admitted to me he did not regard as of any value when they were issued.

If Dr. Grinnan had sold the entire frontage without my knowledge it would not have caused me greater surprise that did the sale of that strip of land in question. He had *had* been paid an
293 exorbitant price for it as well as for the rest of the tract and he had no more right to sell a part than he had to sell the whole of it; hence I was forced to engage in a costly and vexatious lawsuit, and by reason of the case of Grinnan & others having been removed from Fayette to Greenbrier county it was a long time before Mr. Burlew could obtain the necessary information to enable him to commence this suit. Dr. Charles F. Hale was my tenant and held actual and undisputed possession of the property covered by the calls of the deed and he had no reason to make any claim outside of that limit unless he had seen fit to claim a more equitable division of the Huddleston tract, one-half of which was to have been surveyed off the westerly side for a frontage to the two-thousand-acre tract. Robson's map of survey shows that the said tract contains two hundred and thirty acres, showing that the company received ten acres less than they were entitled to. Another thing, at the time this tract was surveyed the entire property covered by the deed of the Forest Hill Company had been transferred to
294 a trustee and was then held by him as a security pledged for the payment of the bonds of the company, which, I believe, was in itself a bar to any change being made that would depreciate the future value of the property. The dividing lines as decribed in the deed are now what I am contending for and not the false line alleged to have been run by direction of McKinney, who was

the agent of Smith and Grinnan only, as is clearly shown by the nature of the service that brought him there.

21. To twenty-first interrogatory deponent answers:

About the year 1878 or 1879 my attention was called to a notice in some newspaper in which my name appeared. I wrote to A. G. Grinnan asking what it meant, and he replied that it did not affect my interest in any way, but that it was a mere matter of form. I knew nothing of the removal of the case from Fayette to Greenbrier county until the proceedings in this suit developed the fact.

22. To twenty-second interrogatory deponent answers:

295 I do not remember, as I lost all interest in the matter after the company abandoned the property. It was an unpleasant reminder of the past that I did not permit my thought to dwell upon any more than I could possibly help, and so it has continued to be up to the present time.

23. To twenty-third interrogatory deponent answers:

For several years A. G. Grinnan had been urging me to buy his adjoining tract, and I told him I had already too much unproductive property on hand, but in the year 1880 I wrote him to this effect: That I would like to make the connection between the front and back land more complete, so that it would show to better advantage on the map, and that I would give him one hundred dollars for so much of the land as he owned running back from about where the Wilson line crosses the track; that it was part of the frontage intended to connect the two tracts, and had not the Forest Hill

296 Company been obliged to suspend their operations on account of the war there is no doubt but they would have claimed it as their right. I had somehow gotten the impression from seeing Robson's map that I could only claim the right of way, because the survey was not corrected whilst the company held possession, and that impression was not removed from my mind until I hunted up the Forest Hill Company's deed after A. G. Grinnan had sold to Wyant what did not belong to him without giving me any notice, as any fair-minded man would have done, knowing it would depreciate the value of my property many thousands of dollars. An examination of the deed showed, to my surprise, that the right of way did not apply to the front tract, but that the deed called for a connection of the two tracts. I at once submitted the matter to Mr. Burlew, who said there was no doubt whatever as — my right to the strip of land lying between the two tracts as shown on Robson's map. I then told him to do what was necessary to pro-

297 tect my interests in the matter. The lines of separation at one point are so close together that I thought the failure to connect was in consequence of the loose maner of running the lines on property of that character in a locality so isolated as that is on the top of a high mountain, and that my deed would always protect me in my just rights. I never knowingly conceded to A. G. Grinnan any right to land lying between the two tracts, knowing it to be covered by the calls of the deed.

24. To twenty-fourth interrogatory defendant answers:

I have no recollection of A. G. Grinnan expressing anything in

word or deed adverse to my interest regarding any portion of the land conveyed to me until 1883, when I wrote him of the sale to Wyant, calling attention to the necessity of correcting the error in the survey, which I suppose to be the fault of the surveyor, and even then he did not claim ownership to justify the act of
298 sale, but he refused to make any correction on the plea that the Forest Hill Company had defaulted on the payment of their bonds, and said as I was now the owner of their property I stood in their shoes, and when they come into a court of equity and claim fulfilment of warrantees they must come with clean hands, showing that they had performed their part of the contract, and that he said (" he said " inserted before signing.—L. H. B.) they cannot do. In an interview I had with him last summer he insisted upon it that the deed gave me the right of way through the front as well as the main part of Elk Ridge property.

25. To twenty-fifth interrogatory deponent answers:

A. G. Grinnan has never made any claim to the strip of land referred to in the last question, to my knowledge, until I wrote him of the sale of the property in 1883, nor has he been in actual possession at any time. When Smith and Grinnan sold the property to the Forest Hill Company they used the Salisbury map to
299 show how the Huddleston and Forest Hill tracts joined each other, and it was subsequently learned that the samples of coal shown as coming from that property did not come from there at all, but had been obtained from some other source.

JOHN HALSTEAD.

Sworn and subscribed before me this 18th day of April, A. D. 1887.

[SEAL.] L. H. BARBER,
Notary Public.

In the District Court of the United States for the District of West Virginia.

JOHN HALSTED
vs.
A. G. GRINNAN *et al.* } In Chancery.

STATE OF PENNSYLVANIA,
Eastern District of Pennsylvania, County of Carbon, } *ss:*

I hereby certify that on Monday, the 18th day of April,
300 A. D. 1887, before me, L. H. Barber, a notary public in and for the county of Carbon, State of Pennsylvania, at the Mansion house, in the borough of Mauch Chunk, county of Carbon, State of Pennsylvania, personally appeared before me, pursuant to the notice hereto annexed, between the hours of 9 o'clock a. m. and 6 o'clock p. m., John Halsted, the witness named in said notice, neither plaintiff nor defendant being represented by counsel, and the said John Halsted, being by me first duly cautioned and sworn

to tell the whole truth and being carefully examined, deposed and said as appears by the deposition hereto annexed.

And I further certify that the said deposition was then and there reduced to writing by me and was, after it had been reduced to writing, subscribed by the witness, and the same has been retained by me for the purpose of sealing up and directing the same to the clerk of the court as required by law.

And I further certify that the reason why the said deposition was taken was that the said witness resides at Mauch Chunk aforesaid, more than one hundred miles from Charleston, West Virginia, the place where this cause is to be tried.

301

And I further certify that I am not related in any way to any of the parties to the above suit; that I am not of counsel or attorney to any of the parties nor am I either directly or indirectly interested in the event of the cause.

And I further certify that the fee for taking said deposition, ten dollars ($10), has been paid to me by the plaintiff, and the same is just and reasonable.

In testimony whereof I have hereunto set my hand and official seal, at the borough of Mauch Chunk, in the county of Carbon and State of Pennsylvania, this 18th day of April, A. D. 1887.

[SEAL.] L. H. BARBER,
Notary Public.

302 *Deposition of Dr. Chas. F. Hale. Filed on the 29th Day of April, A. D.* 1887.

Notice to take depositions.

To A. G. Grinnan, William Wyant, & others:

Take notice that on the 14th day of April, A. D. 1887, between the hours of 9 o'clock a. m. and 6 o'clock p. m., at the office of A. Burlew, in the city of Charleston, West Va., I will take the deposition of Charles F. Hale and others *and others*, to be read as evidence in my behalf in a certain suit in chancery, now pending in the district court of the United States for the district of West Virginia, in which suit I am plaintiff and you & others are defendants. If from any cause the taking of said deposition shall not be commenced or completed on the day aforesaid, the same shall be continued from day to day or from time to time, at the same place and between the same hours, until the same shall be completed.

JOHN HALSTED.

A. BURLEW, *Att'y.*

303 (Endorsed:) Service accepted for Wm. Wyant. J. F. Broun, att'y. Service accepted for the Forest Hill M'f. Co. & Robert Souter, trustee. A. Burlew. Service accepted of the within notice as atto's for A. G. Grinnan. Miller & Gallaher.

Depositions taken before the undersigned authority in and for Kanawha county, West Virginia, at the office of A. Burlew, in the city of Charleston, West Va., on the 14th day of April, 1887, between the hours of 9 o'clock a. m. and 6 o'clock p. m., pursuant to the annexed notice, to be read as evidence on behalf of the plaintiff in a certain suit in chancery pending in the district court of the United States for the district of West Virginia, holden at Charleston, wherein John Halstead is plaintiff and A. G. Grinnan, William Wyant, & others are defendants.

304 Present: A. Burlew, for plaintiff.
Do. L. G. Gains, " Wm. Wyant, defendant.

On motion of A. Burlew, counsel for John Halstead, plaintiff in said cause, and in the absence of the witnesses for plaintiff, the taking of these depositions is adjourned until Monday, April 25, 1887, at same place and between the same hours.

L. E. McWHORTER,
Notary Public.

LAW OFFICE A. BURLEW, CHARLESTON, W. VA.,
9.30 A. M., *April* 25, 1887.

Pursuant to adjournment, taking of depositions resumed.
Present: A. Burlew, for plaintiff.
Do. Gains & Broun, for defendants.

(Dr.) CHARLES F. HALE, a witness of lawful age, being by me first duly sworn, says in answer to the following questions:

By A. BURLEW:

1st Q. In what county & State do you live, and what is your occupation?

Ans. Fayette county, W. Va.; physician by occupation.

2d Q. How long have you lived in Fayette county, W. Va., and where did you live before coming to Fayette county?

Ans. Have lived in Fayette county since 1859, but not continuously. I was absent during the war. I lived in New York
305 city before coming to Fayette county, W. Va.

3d Q. What interests brought you to Fayette county?

Ans. I was interested in the Forest Hill property. I owned one-tenth part of it.

4th Q. Is that the same Forest Hill property described in the complainant's bill in this suit?

Ans. Yes, sir.

5th Q. What connection, if any, did you have in the organization of the Forest Hill Mining & Manufacturing Company, and how long did such relations continue?

Ans. I was pres't of the company, and continued to be so as long as the company was in existence. The Co. was organized in 1859, and stopped work in 1861. I continued to act as pres't in all matters pertaining to the Co. until the sale under the mortgage to Halstead in 1864.

6th Q. Examine the copy of deed filed in this cause with complainant's bill marked "Ex. B," and state what you know about the lands therein described, and what relations you have had with them and how long.

Ans. I knew all the lands therein described; am thor-
306 oughly acquainted with them, and have been for a great many years. I have been living on the property for about 20 years.

7th Q. Since the purchase of the land by John Halstead, in what capacity have you been living on these lands?

Ans. Simply an occupant for Halstead.

8th Q. What has been your object in living on these lands for Halstead since his purchase of them, and to what extent, if any, have they been worked, operated, or improved?

Ans. My object in living on them was simply to take care of the property. There have been no improvements made on them.

9th Q. On what part of the lands have you lived and have you not had some portions of the land under fence and cultivation where you have so lived?

Ans. I live on what is known as the Huddleston tract—that is, the front. Of course I have had the land inclosed & cultivated ever since I have lived there, and I have also had three houses erected on it. These three houses are in addition to those I erected for the company in 1859. I erected six buildings for the company
307 besides the house I live in.

10th Q. Do you mean that these buildings and improvements were on that portion of the Huddleston tract purchased by the Forest Hill Co. from Grinnan & others above referred to?

Ans. Yes.

11th Q. How continuous has been your occupation of these lands for the last twenty years?

Ans. I have occupied them constantly for more than twenty years.

12th Q. Did the Forest Hill Mining & Manufacturing Company have any improvements on that portion of the company's land known as the Forest Hill tract of two thousand acres; if so, on what part and who made them?

Ans. Yes; there was one improvement in Tucker hollow made by a man by the name of Estep; another at the head of Tucker hollow made by a man by the name of Smith; a third made by one Giles, but I have forgotten just where it was. These portions of the tract were occupied with my consent. The clearings were
308 made for the purpose of putting up residences and for cultivation; they were all fenced. To the best of my knowledge the Estep clearing contained 25 or 30 acres. The Smith clearing was not over 10 acres. The Giles clearing I don't remember anything about.

13th Q. Was the Estep clearing above or below what is known as the Gallatin line, which runs into the Wilson survey, from which the Forest Hill title is derived?

Ans. Above the Gallatin line & outside of the Gallatin claim. This Estep clearing is south of the Gallatin line.

14th Q. Examine the report and map I now hand you on which is printed "Report on the Forest Hill & Elk Ridge mining estates," marked Exhibit "A," and state what you know about it, where it came from, and who made it.

Ans. I recognize this map as one given me by either Smith or Grinnan—I think Grinnan gave it to me—made by Prof. Saulsbury. It was given to me as a correct and reliable map of the property, and it was on the strength of that map principally that we bought the property. I afterwards found that it was incorrect. It
309 shows a union of the back & front tracts, according to the terms of the deed, but we found afterwards that it was incorrect—not so—that they did not unite.

15th Q. In your last ans. do you mean the "Smith & Grinnan" who conveyed the land to the Forest Hill Company?

A. Yes.

Counsel for plaintiff now files as a part of this deposition the report & map referred to as Exhibit "A."

16th Q. Point out on the map referred to the Forest Hill tract referred to in Exhibit B, with the bill heretofore referred to; also what is called the Huddleston tract referred to in the said deed.

Ans. The Forest Hill tract is included in the boundary described by the figures numbers 1, 2, 3, and 4 on the map, and the Huddleston tract is included in the boundary described by the figures numbers 5, 6, 7, and 8 on the map.

17th Q. Examine the description of that part of the Hud-
310 dleston tract purchased by the Forest Hill Company, as set out in the deed marked "Ex. B" referred to, and point out what part of the Huddleston tract is embraced in that description.

Question objected to by counsel for Wyant.

Ans. The deed calls for 100 acres, more or less, to be surveyed off the western side of said tract by a line running from the northerly to the southerly side of said tract to be bounded on the south by tract hereinabove conveyed & on the north by the Great Kanawha river.

18th Q. Which is the westerly side of the Huddleston tract as laid down on said map?

Ans. The lower portion; that lying farthest down the river.

19th Q. At the time the Forest Hill Company purchased these lands how many acres were supposed to be in the entire Huddleston tract?

Ans. Two hundred.

20th Q. Did the Forest Hill Mining & Manufacturing Company ever authorize any one to so lay off its purchase of that part of the Huddleston tract that would change in any way the location

311 of its purchase from the calls of the deed from Smith & Grinnan to the company hereinbefore referred to?

Question objected to by counsel for Wyant as leading & otherwise illegal.

Ans. No.

21st Q. Did the Forest Hill Company ever accept in any way a division of the Huddleston tract so as to change the boundary of that part purchased by it from the calls of the deed referred to?

Question objected to by counsel for Wyant as leading & otherwise illegal.

Ans. No.

22d Q. What object did the Forest Hill Company have in purchasing the westerly part of the Huddleston tract in connection with the Forest Hill tract of 2,000 acres?

Question objected to by counsel for Wyant.

Ans. Simply as an entry to the back lands.

23d Q. Would the company have purchased the Forest Hill tract from Smith & Grinnan without purchasing at the same time that part of the Huddleston tract it did purchase; and, if not, why not?

Question objected to by counsel for Wyant.

312 Ans. No; they would not have purchased it, for the simple reason that without the Huddleston tract there is no outlet for the back tract.

24th Q. What damage would it be to the Forest Hill tract to so lay off the Huddleston tract as to have a small strip of land running between that portion of the land purchased by the Forest Hill Company and the Forest Hill tract as belonging to that portion of the Huddleston tract retained by Smith & Grinnan?

Question objected to by counsel for Wyant because irrelevant & immaterial & because the witness has already stated that the Huddleston tract did not join the Forest Hill tract nor unite with it.

Ans. It would be very difficult to estimate the damage, but I would say it would destroy at least one-half the value of the back tract.

25th Q. What is the character of the back tract of 2,000 acres and in what does its value consist?

Ans. It is coal and iron land and its chief value lies in that.

26th Q. Examine the exceptions made by counsel for defendant to the 24th question with reference to your answer to the 14th question and explain what you mean in the last part of said an-
313 swer by the expression "we found afterwards that it was incorrect; not so, that they did not unite." Does not, as a matter of fact, the Huddleston tract join on the Forest Hill tract as represented on that map?

Question objected to by counsel for Wyant as irrelevant & otherwise illegal.

Ans. I mean "we found afterwards that it was incorrect in that it shows a union of the front and back tracts."

They do show that they join on the map, but as matter of fact they do not join.

27th Q. Does not that portion of the Huddleston claimed by Wm. Wyant in this case under a purchase set up by him bind on the Forest Hill tract?

Question objected to by counsel for Wyant as leading & otherwise illegal.

Ans. Yes.

28th Q. Then, what do you mean by saying, as you do in answer to the 26th question, "as matter of fact they do not join"?

Question objected to by counsel for Wyant as argumentative.

Ans. I don't understand your question. You asked me if the Huddleston tract joined the Forest Hill tract. I said they do on the map, but as matter of fact they do not.

314 29th Q. Examine the map filed as part of the answer of A. G. Grinnan in this cause pretending to represent that part of the Huddleston tract purchased by the Forest Hill Company, and state, if the Huddleston tract be so divided as to give this land represented on this map to the Forest Hill Company, whether or not the southerly part of the remaining part of the Huddleston tract would not border on the northerly part of the Forest Hill tract.

Question objc. to by counsel for Wyant as leading & argumentative.

Ans. Certainly; they would lie side by side. I mean the two tracts—that is, the easterly part of the Huddleston tract lies by the side of the westerly part of the Huddleston tract.

At 12.30 p. m. adjourned for dinner until 2 p. m.

30th Q. If the Huddleston tract were divided as claimed by A. G. Grinnan in this case, would it not entirely separate that portion which the Forest Hill Company would get from the Forest Hill tract of 2,000 acres, and would not that portion which Grinnan would get border on the 2,000-acre Forest Hill tract?

Question objected to by counsel for Wyant as leading & otherwise illegal.

Ans. It would.

315 31st Q. Please examine the last part of your answer to the 14th question and your answer to the 26th and 28th questions respectively, and say whether you understand those questions differently from when they were first propounded to you; if so, answer them.

Ans. I entirely misunderstood the question when it was first asked me. I supposed the question referred to that portion of the Huddleston tract which was set over to the Forest Hill Company and not to the whole Huddleston tract. I wish to correct *to* my

answers to all former questions referring to *to* that matter and say that the Huddleston tract does join the 2,000-acre Forest Hill tract, and that several courses of the two tracts are identical.

32d Q. Who set over a part of the Huddleston tract to the Forest Hill Company, as you state in your last answer?

Ans. It was done by Smith & Grinnan.

33d Q. I will ask you again, did the Forest Hill Company or John Halstead ever ratify, approve, or affirm such laying off of the Huddleston tract as would separate it as claimed by Grinnan
316 in this suit, so as to separate that part which the Forest Hill Company would get from the 2,000-acre tract?

Question obj. to by counsel for Wyant.

Ans. No such authority was ever given by Halstead or the Forest Hill Company or by myself. In fact, it was not till about two years afterwards that any of us knew that the two tracts did not unite. I mean by that that the portion of the Huddleston tract set over to the Forest Hill Co. did not unite to the 2,000-acre tract.

34th Q. Who set over that portion of the Huddleston tract to the Forest Hill Co., as stated in your last answer, and what authority have they to do so?

Ans. The surveys were made and the lines were run by Robson, the county surveyor, at the time, and to the best of my knowledge and belief it was done on the orders of Grinnan. It was a part of their agreement with the Forest Hill Company that the survey should be made and that the lines should be run properly. I was in N. Y. when Grinnan had the lines run by Robson, and when I came back in 1859 I learned for the first time that the lines had been run and the division had been made. This survey was made & lines run in the fall of 1859. In reference to the authority for running those lines and for making the division, a man from New York by the name of McKinney had been sent out here by Smith
317 & Grinnan to oversee the survey & division, and, of course, I presume, to act as their agent in the matter. The surveyor furnished us only with a plat of the Huddleston tract—that is, the portion which belonged to us. The whole tract of 2,000 acres was surveyed by Robson some time about February, early in 1861, and after that survey was made we had a plat given us not only showing the 2,000 acres but also the one hundred acres of frontage. It was then for the first time that we knew or indeed had any suspicion that the Huddleston frontage did not unite with the Forest Hill tract. This occurred just at the beginning of the war, in 1861.

35th Q. In that survey or plat furnished you by Robson at the instance of Grinnan, in 1859, was there anything to indicate on the said map or otherwise that the land so laid off did not border on the Forest Hill 2,000-acre tract, as called for by the deed of Smith & Grinnan to the Forest Hill Company?

Question obj. to by counsel for Wyant because the plat is the best evidence, & they here call for production of the same.

Ans. There was nothing.

36th Q. Were any of the lines of the Forest Hill 2,000-acre tract represented on the said map?

318 Ans. No; not a line.

37th Q. Were any representations made by Smith & Grinnan or either of them or by the surveyor who made the survey in 1859 or by any one to the Forest Hill Company that the land laid off by Smith & Grinnan as a part of the Huddleston tract to the Forest Hill Company did not border on the Forest Hill tract of 2,000 acres?

Question objected to by counsel for Wyant as leading & otherwise illegal & immaterial.

Ans. There were none.

38th Q. Is it not a fact that when the Forest Hill Company's lands were run in 1861 and for some time after, when you say your attention was first called to the error in the survey, that it was considered by the company an error in platting, rather than an error in surveying the land?

Question objected to as leading & otherwise illegal by counsel for Wyant.

Ans. It was. That was the impression that all of us had.

39th Q. When did A. G. Grinnan first make any actual claim to the Forest Hill Company that he owned & claimed a strip of land that separated the Forest Hill Company's front land from its back 2,000-acre tract?

319 Ans. I can't remember.

40th Q. If the Huddleston tract as represented on the map in Exhibit "A" had been divided according to the calls of the deed from Smith & Grinnan to the Forest Hill Company, would not the company's front & back land have joined and made one continuous tract, according to the calls of their said deed?

Question objected to as leading & otherwise illegal by counsel for Wyant.

Ans. It would.

41st Q. What possession has A. G. Grinnan had to that portion of the Huddleston tract claimed by him since the making of the deed by Smith & Grinnan to the Forest Hill Mining & Manufacturing Company? I mean actual possession of said land by occupancy or acts equivalent to occupancy.

Question objected to because it submits a legal question to witness & because otherwise illegal by counsel for Wyant.

Ans. I know of none. There has certainly been no occupancy of the place.

42d Q. Has the said land during the period referred to or any part thereof been fenced or improved?

Ans. No.

320 43d Q. According to what boundaries have you held possession of the lands described in the deed from Smith & Grinnan to the Forest Hill Company for the last 20 years?

Ans. According to the calls of the deed.

44th Q. How do you undertake to account for the action of A. G. Grinnan in laying off or having laid off the Huddleston tract in 1859 so as to separate the Forest Hill Company's front land from its back land in express violation of the calls and covenants of his deed to the Forest Hill Company?

Question obj. to by counsel for Wyant as argumentative & otherwise illegal.

Ans. I do not undertake to account for it at all. Grinnan has never offered any explanation of it to me.

45th Q. Can it be accounted for on any theory except fraud upon the company?

Question objected to as argumentative, immaterial, & otherwise illegal by counsel for Wyant.

Ans. In no other way that I can see. I believe it was intentional fraud.

Answer objected to by counsel for Wyant.

46th Q. If it had been reported to the Forest Hill Company by Smith & Grinnan after they had completed the survey of the Huddleston tract, in 1859, that it had been so divided that the com-
321 pany's front land was separated from its back land what would have been the answer of the company to him in regard to it at that time?

Ans. It would have refused to accept the deed and compelled him to return the purchase-money.

47th Q. A. G. Grinnan says in his answer filed in this cause that two members of the Forest Hill Mining & Manufacturing Company, namely, Hale & Eames, were present with the surveyor when he made the survey of the Huddleston tract, in 1859. State who the said Grinnan refers to particularly when speaking of Hale & Eames, and whether or not you were present when the said survey was made and if Eames was present. State what authority he had to represent or bind the company in accepting any survey of the land in violation of the calls of the company's deed for them.

Ans. By Hale he refers to me, of course. I was not present when the line was run. I was in New York. My mind is perfectly clear on that point owing to certain circumstances. The Eames referred to was Richard Eames. He was present. He was our machinist and not connected with the company in any other capacity. He did not have a shadow of authority either to change the lines as run or to accept or reject the survey.

Counsel *to* plaintiff presents to the notary an original plat and notes of T. S. Robson, surveyor, of the land surveyed by him
322 for Smith & Grinnan in 1859, hereinbefore referred to by the witness, and as this is an important paper which does not belong to the witness he asks the notary to take a copy of this paper & mark same as Exhibit "B" with this deposition and file the same

with this deposition and return to counsel this original paper, and if on the trial of this cause this original paper is needed by either party it shall be produced.

Cross-examination:

1st Q. by Broun & Gaines, counsel for Wyant, def't. When was the Forest Hill Mining & Manufacturing Company formed and who composed it?

Ans. In June, 1859. Stockholders—Putnam Brinley, Edward Brinley, John Halstead, John Osborne, Lewis A. Rosenmiller, David G. Barnitts, John McClellan, and myself & John F. Cowan.

2nd Q. by same. Who were the directors and officers of the said company?

Ans. I was president, Rosenmiller was treasurer, and Barnitts was secretary. I believe all the stockholders nearly acted as directors.

3d Q. by same. For what was the deed of trust executed by the company to Robert Soutter, trustee, dated 15 June, 1859?

323 Ans. For the purpose of securing the company's bonds.

4th Q. I notice that there is secured by said deed certain notes or bonds to C. F. Hale, Richard Eames, & others named. Were not these bonds for monies advanced by the party so secured on the purchase of the land; and, if not, for what were said bonds given?

Ans. The payment on the land was made by two sets of notes running a short time, which were paid, and the remainder of the purchase-money was secured by the issue of bonds.

5th Q. What proportion of the purchase-money was represented by the notes and what by the bonds?

Ans. If I remember rightly, the notes amounted to about twelve thousand five hundred dollars. I think that was it, and forty thousand dollars by the bonds.

6th Q. For what were the sixteen (16) promissory notes mentioned in the deed of trust given?

Ans. In part payment for the land in lieu of cash down.

7th Q. Was not the Eames there mentioned the same Eames who assisted in laying off the 105 acres of the Huddleston tract to the Forest Hill Company?

Question objected to by counsel for plaintiff because witness has not said that Eames assisted in laying off the Huddleston tract.

Ans. No.

324 8th Q. How long after this survey laying off the 105 acres of the Huddleston tract was made before you returned from New York to this land?

Ans. That survey is dated Oct. 14, 1859. I returned from New York during the early days of December following.

9th Q. When & from whom did you receive plat and survey, Exhibit "B" with this deposition?

Ans. I can't remember who handed it to me. It was lying with

other papers in the office and some one in the office handed it to me. I received it immediately after my return.

10th Q. Were you at that time president of the company?

Ans. Yes.

11th Q. Where has this plat been since then?

Ans. It has been in my hands most of the time. Mr. Halstead has had it part of the time, also.

12th Q. When did Halstead first know of it?

Ans. I don't know.

13th Q. Are not the lines of this 105 acres so laid off to the Forest Hill Company well marked upon the ground by natural monuments, such as trees, &c.?

Ans. Some of them are & some are not.

325 14th Q. Is not the division line through the Huddleston tract well marked, as aforesaid?

Ans. Part of it is and part of it is not.

15th Q. Are you not well acquainted with said division line on the ground?

Ans. No. I am not very well acquainted with it I have never been over that line—that is, the full length of it.

16th Q. Please show on Exhibit "B" with this deposition the line of said 105 acres that you are familiar with.

Ans. I am most familiar with the river line and the long line of 460 poles on the said tract of 105 acres.

17th Q. Are you not familiar with the 244 poles line of said map, and have you not been over most, if not all, of the division line of the Huddleston tract?

Ans. I have been a short distance on the 244 poles line, but never was on the 84 poles line or the 126 poles line.

18th Q. Have you not, as the agent and representative of the company and John Halstead, resided on that portion of the Huddleston tract embraced in the 105-acre survey which was so set

326 apart to it from the time of the purchase of said land by the company, in June, 1859, to the present time, excepting the time you were absent during the war?

Ans. Yes.

19th Q. Did I correctly understand you to say the 105 acres was set apart to the company by Grinnan by virtue of arrangements made at the time of the purchase of these lands by the company?

Question objected to because the counsel does not understand the witness to have made any such statement, but the witness has stated that Grinnan agreed to lay off the land according to the calls of his deed & not otherwise.

Ans. The agreement was that it should be laid off according to the calls. The agreement was that we were to have one-half of the frontage and they were to have the survey made at their own expense, and they agreed that the tract should be properly and fairly divided, and of course the union was to be made to the back land according to the deed.

20th Q. Did you or Halstead or the company ever object to the

division line so run by Robson in Oct., 1859, as laid down and shown on said plat and survey as Exhibit —; and, if so, when, where, and to whom?

327 Ans. I do not know that any objection was made to it until lately. We have had no opportunity of doing so. I think, however, that Halstead mentioned the matter to Grinnan some years ago.

21st Q. When was the first objection made that you knew personally of?

Ans. I don't remember.

22d Q. Do you know personally of any objection made to Grinnan or Wyant or to any other person before the bringing of this suit; and, if so, when, where, & to whom?

Ans. My recollection as to that is not very clear. It is my impression now that I mentioned the subject to Grinnan in writing to him upon some other matter. I don't know when it was, but it was a good many years ago—several years ago.

23d Q. Was any other division line run or claimed by the Forest Hill Company or by Halstead?

Ans. No.

24th Q. Please state in detail the improvements, buildings, and enclosures made by said company and by Halstead, and especially those that were put up before the war.

328 Ans. There were six or seven dwelling-houses—small cottage houses—a coal mine & oil factory, and all the necessary machinery and plant, and my own house, some twelve or fifteen acres enclosed in fence and cultivated. There was a blacksmith shop, cooper's shop, barn, and stable. That is all I think of.

25th Q. Were not said improvements confined exclusively to the western side of the division line drawn by Robson as shown by Exhibit "B" with this deposition?

Ans. Yes.

26th Q. Were not a part of the fences around the enclosures built on and along said division line?

Ans. I believe they were part of the way.

27th Q. Did not one Janett as tenant first of Grinnan and afterwards of Wyant live for some fifteen years on said Huddleston survey, on the eastern side of said division line, up to it?

Ans. No; he did not.

28th Q. Do you know where Janett lived?

Ans. Yes.

329 29th Q. Was it not on said Huddleston survey east of said division line?

Ans. It was on land claimed by William Buster. I thought at first it was on the Forest Hill tract, but investigated and found he was on Buster'- land.

30th Q. Was not Janett a tenant of Wyant, paying rent to him, and has not Mooney since Janett's death occupied the place?

Ans. That is a matter I don't know anything about.

31st Q. Has the mining company or Halstead had any improvements or possession on the eastern side of said division line?

Ans. No.

32d Q. Has not William Buster's heirs recovered all that portion of the Forest Hill tract lying between the Gallatin and the Wilson lines and all that part of said tract adjoining said Huddleston tract?

Question objected to because the record is the best evidence.

Ans. They recovered a verdict against us a year or two ago in the circuit court.

Answer objected to because the record of the court is the best evidence.

330 33d Q. Was not all that portion of the Forest Hill tract which adjoins the Huddleston tract embraced by the verdict of the jury in the case of Sarah Buster & Mary McGee against John Halstead, pending in the district court of the United States for the district of West Virginia, in ejectment?

Question obj. to by counsel for pl't'ff because the record is the best evidence.

Ans. I think it was—nearly all.

34th Q. Did not the Forest Hill M. & M. Co. secure a perpetual right of way from the Forest Hill tract over the Elk Ridge tract, lying between it and Armstrong's creek, for transporting minerals & products of Forest Hill tract to market for the use & enjoyment of said tract, and does not Halstead hold all the rights so acquired?

Question objected to because the deed shows what right of way the Forest Hill Co. or John Halstead have over the Elk Ridge tract, and nothing the witness can say can diminish or increase those rights.

Ans. The deed calls for that right of way over and through the Elk Ridge tract, and whatever rights or privileges belong to the Forest Hill Company under that deed now belong to Halstead.

331 35th Q. For what purpose were those rights and privileges acquired by the company?

Ans. For getting the coal to market from the extreme back land.

36th Q. Does not the Elk Ridge tract, over and through which those rights and privileges are granted, embrace all the land between the Forest Hill tract and Armstrong's creek?

Ans. Yes.

37th Q. Is there not a railroad up Armstrong's creek and are not large quantities of coal mined in the lands adjacent thereto?

Ans. There is a railroad up Armstrong; how much coal is mined I don't know.

38th Q. Cannot the Forest Hill tract be conveniently reached & coal mined therefrom & shipped by way of Armstrong's creek and Tucker's hollow?

Ans. It could be, but not conveniently.

39th Q. Where did the members of the company in 1859 mainly reside?

Ans. In New York city.

40th Q. Were you acquainted with John McKinney, mentioned by you; and, if so, where did he live?

Ans. I have met him, but had no particular acquaintance
332 with him. I don't know where he lived.

41st Q. Was he not a nephew or relative of John Halstead?

Ans. No relation whatever.

42d Q. Was he not the same John M. McKinney who took the acknowledgment to the deed from Smith & Grinnan to the Forest Hill Co. in New York city in 1859?

Ans. Yes; that's about all I know of him. It was the only time I met him—when he took the acknowledgment to the deed.

43d Q. Was he not com'r of deeds, residing in New York city?

Ans. I don't know.

44th Q. Who negotiated the purchase with Smith & Grinnan on behalf of the company?

Ans. The sale was negotiated with this man Cowan, who was acting as agent of Smith & Grinnan. He was one of the company and seemed to be acting for both sides.

45th Q. Do I understand that Cowan was agent of the company and represented it in the negotiation of this purchase?

Question obj. to by counsel for plaintiff because the former answer covers the question fully and completely.

Ans. All I can say is Cowan was at that time a member of
333 the company and was agent for the sale of the property. In making up the company there was one share over that was not taken, and Cowan offered to take it and did take it. That's how he came to act for both sides.

46th Q. Did any one else than Cowan act for the company or represent it in the purchase of this property?

Ans. Not that I know of.

47th Q. Was not Cowan a director of the company at the time of the purchase and after?

Ans. No; I don't think he ever was a director. He certainly was not after, for he backed out immediately after the purchase.

48th Q. Was he authorized to act for the company in regard to the purchase?

Ans. No; don't know anything about it. He was not authorized to act for the company, for their was no company until after the purchase.

49th Q. Did not you say a moment ago, in answer to the last question, that you supposed he was; that he was authorized to act for the company in regard to the purchase, but you did not have much to do with it yourself?

Ans. I did say I supposed he was, but I corrected myself
334 & had it crossed out. As for myself, I had little or nothing to do with the purchase.

50th Q. When did you first see Smith & Grinnan & where did they live?

Ans. I first saw them in New York. Both of them told me they

lived in Virginia—one of them, Smith, at Fredericksburg and Grinnan at Orange C. H.

51st Q. Did you first meet them before or after the execution of the deed, and were you not present when the agreement was made that they were to have the western part of the Huddleston tract run off for the Forest Hill Company?

Ans. I don't know whether I met them before or after the execution of the deed. I can't tell whether I was present when the agreement was made or not. I have forgotten.

52d Q. Who was with Robson when he ran the division line shown in Exhib. "B," and who was at Huddleston's house on the opposite side of the river when the line was run and plat was made?

Ans. I only knew by hearsay who was with him. I am sure I don't know who was at Geo. Huddleston's.

53d Q. Who do you understand was along with the survey and at the time the plat was made?

Ans. I understood young Eames was with him, but who
335 the others were I don't know.

54th Q. Where are the records and minute books of the company?

Ans. I don't know; they are not in my possession.

55th Q. When did you last see them?

Ans. As near as I can recollect, it was about 25 years ago.

56th Q. Where were they and in whose possession?

Ans. They were in the possession of the secretary of the company, Barnitts.

Redirect examination.

By A. BURLEW:

1st question. What necessity was there for the Forest Hill Company to actually know anything about the division line of the Huddleston tract except a short distance from the river, and was not all their buildings that you have referred to built on and near the Kanawha river?

Ans. The necessity was to know whether there was a connection between the back & the front lines. The buildings were certainly near the bank of the river, for it was the only place where it was possible to put them.

336 2d Q. In looking at the division line as run by Robson in 1859 did not the company simply at that time look to that part of the division line running a short distance back from the Kanawha river in order to be sure that their buildings were properly located?

Ans. Yes; that is certainly so.

3d Q. Is it not a fact that there was no occasion at that time to examine the division line as run by Robson any further than it was necessary to locate these buildings?

This & next preceding quest. objected to by counsel for Wyant because leading & otherwise illegal.

Ans. It is certainly so.

4th Q. Has there been any time since the erection of the company's buildings on its land that it was necessary for the company to actually ascertain the entire division line between the Huddleston tracts until the difficulty grew up between Halstead & Grinnan concerning the same out of which this suit was instituted?

Ans. Yes; there was. We were thinking of leasing the property, and in order so to do we had to find out the connection between the back and the front lands, and then it occurred to us that
337 there was a difficulty about the union of the two tracts.

5th Q. How long after the company ascertained the defects in Robson's survey was it that complaints were made to Grinnan about it with a view of getting the matter settled?

Questions objected to by counsel for Wyant because it is not known there are any defects in the survey.

Ans. I don't remember.

6th Q. In answer to the 32d question on cross-examination you say "they (meaning the Wm. Bustee heirs) recovered a verdict against us a year or two ago in the circuit court." Did you not learn this fact from your counsel and have you ever examined the record personally to see if such is the fact?

Ans. Certainly; I learned it from my counsel; I have never examined the record.

7th Q. Have you not been informed by the same counsel that that verdict or judg't has been reversed by the Supreme Court of the United States and are you not just as well satisfied that this is true as you were satisfied that the judg't or verdict was rendered as you have stated?

338 Ans. I have certainly heard that the judgment was reversed by the Supreme Court.

Recross-examination.

By J. F. BROUN:

1st Q. When was it you were thinking of leasing, as stated in your 4th answer in your redirect examination, when it occurred to you that there was difficulty about the union of the two tracts?

Ans. To the best of my recollection it was five or six years ago.

2d Q. You spoke of noticing the division line as run by Robson for the purpose of locating the place for the buildings of the company. How did you determine the proper location?

Ans. The location of the line was marked by a post and also by marked trees.

3d Q. Had you with you at the time of locating the place of the buildings Robson's survey, Exhibit "B" with this deposition?

Ans. I think I had, but am not sure of it.

And further this deponent saith not.

CHAS. F. HALE.

Witness Fees.

1 day's attendance	$1 50
30 mi. travel	3 00
	$4 50

Paid by A. Burlew.

339 STATE OF WEST VIRGINIA, }
Kanawha County, } *ss:*

I, L. E. McWhorter, a notary public in and for said county & State, certify that the foregoing deposition of Chas. F. Hale was taken, sworn to, and subscribed before me at the time and place and for the purpose mentioned in the notice hereto attached and the caption of this deposition; that I wrote the questions and answers; that I am not related to or of counsel for any of the parties to this cause and am in nowise interested in the result of the said cause.

Given under my hand this 26th day of April, 1887.

L. E. McWHORTER,
Notary Public.

Fees.

Notary public fees paid by A. Burlew:

72 folio deps. @ 20c.	$14 40
Filing 2 exhibits @ 10c.	20
Copy plat & map	70
	$15 30

340 EXHIBIT "B" referred to in the foregoing deposition is in the words and figures following, to wit:

(See diagram marked page 340.)

Plat of the Land of the Forest Hill Coal & Mining Company Bought of Geo. P. Huddleston.

Beginning at a large sycamore on the bank of the Great Kanawha river at the head of Wheeler's island & running S. 55¼° W. 460 poles to two pines on a ridge on a line of the original survey; thence with said line S. 33° E. 10 poles to a stake on said line; thence N. 55¼° E. 126 poles to a lynn, maple, & dogwood & ironwood on a north hillside; thence N. 80 E. 84 poles to a pine, gum, & chestnut on the point of a ridge; thence N. 60 E. 244 poles to a beech on the bank of the river, & thence N. 35 W. 70 poles down & with the river to the beginning, containing 105 acres.

Fee, 50 cents.

T. S. ROBSON, *S. F. C.*

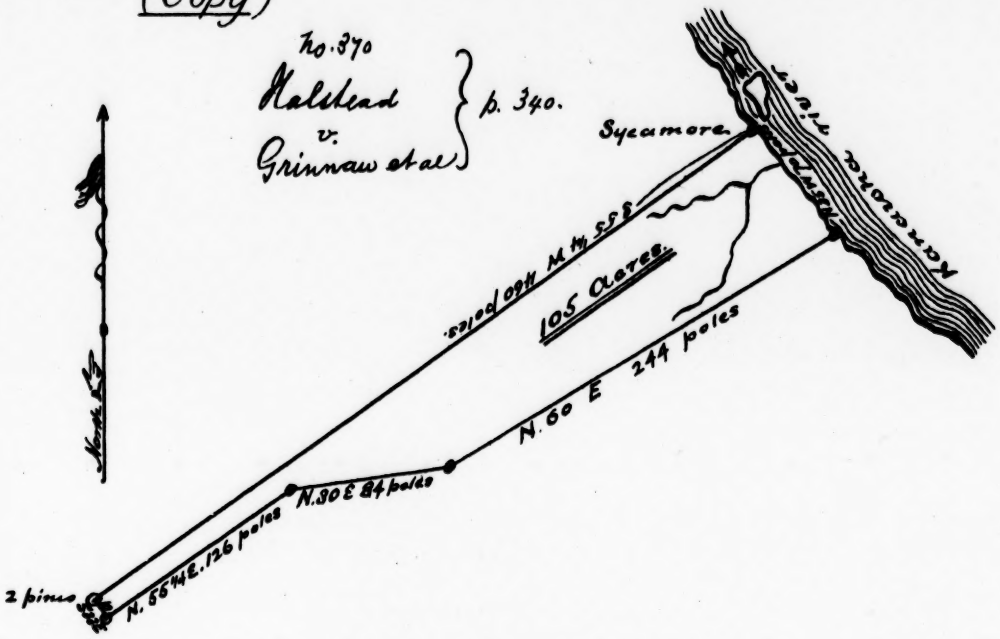
Oct. 14, 1859.

(Copy)

No. 370

Halstead
v.
Grinnaw et al

} p. 340.



(Endorsed:) "Plat of 105 acres of the Forest Hill Coal &
341 Mining Co.'s land bought of G. P. Huddleston."

(Endorsed:) Exhibit "B" filed with deposition of Chas. F. Hale before me in the ch'y cause of Halstead *v.* Grinnan & others, in U. S. dist. c't, on Apr. 25, 1887, (this) copy made and marked as this (original). L. E. McWhorter, notary public.

EXHIBIT A filed with this deposition is in the words and figures following, to wit:

342 REPORT ON THE

FOREST HILL & ELK RIDGE MINING ESTATES

ON THE

KANAWHA RIVER, VIRGINIA,

BY

DR. J. H. SALISBURY,

WITH AN

APPENDIX.

Richmond:
Printed at the Whig book and job office.
1858.

(By direction of counsel for plaintiff, John Halstead, the report is omitted from this record and only the following map copied.

L. B. DELLICKER,
Clerk U. S. C. C., D. W. Va.)

(Here follows map marked p. 342*a*.)

343 Said report and map are marked as follows:

Exhibit "A" filed with deposition of Chas. F. Hale before me on the 25th day of April, 1887, in the cause of Halstead *vs.* Grinnan & *als.*, in U. S. dist. c't, D. W. Va.

L. E. McWHORTER,
Notary Public.

(Endorsed:) Received from hands of notary & filed in the clerk's office of said court, at Charleston, W. Va., this 29th day of April, 1887. Teste: J. Y. Moore, cl'k D. C. U. S., D. W. Va.

344 *Deposition of A. G. Grinnan. Filed on the 28th Day of September*, 1887.

To Mr. John Halstead:

You are hereby notified that on the 8th day of October, in the year 1887, at the residence of Dr. A. G. Grinnan, in the town of Orange C. H., Virginia, between the hours of 10 a. m. and 6 p. m.

of that day, we shall proceed to take the depositions of A. G. Grinnan & others, to be read as evidence in our behalf in a certain suit in equity depending in the district court of the United States for the district of West Virginia, sitting at Charleston, in said State, wherein we are defendants and you are plaintiff, and if from any cause the taking of the said depositions be not commenced or, if commenced, be not concluded on that day the taking thereof will be adjourned from time to time, at the same place and between the same hours, until the same shall be completed.

WM. WYANT & OTHERS,
Defendants.

Fayette C. H., W. Va., September 30th, 1887.

345 I accept service of the within notice.

A. BURLEW,
Att'y for John Halsted.

Sept. 30, 1887.

The reading of the deposition of A. G. Grinnan is objected to by counsel for John Halsted on the trial of this cause because it does not appear to have been taken in accordance with the act of Congress which authorizes the taking of it.

Nov. 8, 1887.

A. BURLEW.

In United States District Court for the District of West Virginia, Sitting at Charleston, in said State.

J. HALSTED
vs.
WM. WYANT *et al.*

The deposition of A. G. Grinnan, of Virginia, taken at Orange C. H., Virginia, between the hours of 10 a. m. & 6 p. m., before John G. Williams, notary public of Orange Co., Va., according to notice given to plaintiff and which is hereto attached, to be read in evidence in above-named causes.

The defendant, being duly sworn, states that Mr. Thomas Robinson, surveyor of Fayette county, was directed to lay off the part of the Huddleston tract sold to the Forest Hill Company ac-
346 cording to the terms of the deed to said company, and in a manner as to detail, such as exact courses and distances, as would be satisfactory to the agents of the company or members of the company present at the survey. Mr. Eames, a stockholder, was present. Dr. Hale, brother-in-law of the plaintiff (the plaintiff was a stockholder of Forest Hill Company) *and* was supposed to represent especially the plaintiff's interest and the company. Mr. J. McKenney, a lawyer of New York, who was nephew to Judge Cowan (a stockholder), was present as representing the deponent, his uncle, Judge Cowan, and also the company, and the lines were run in 1859 under the direction of these gentlemen by the sur-

veyor, and it was judged necessary by McKenney that the company should have five acres more than the deed called for in order that the lines of the tract allotted to the Forest Hill Co. in the division of the said Huddleston tract should be entirely satisfactory to the company. The copy of J. McKenney's letter to deponent, dated Aug. 9, 1859, written after his return from the survey and filed with deponent's answer to J. Halstead's bill in above-named suit, is a true copy.

The deponent was not present, and the division of the said
347 Huddleston tract was made by directions of Eames, a stockholder; Dr. Hale, agent for and brother-in-law of another stockholder & for the company, and J. McKenney, nephew of another stockholder, and representing his interests, and was entirely satisfactory to said company & really made by it, and any departure from the terms of the deed, such as making the tract 105 acres instead of 100, or other departure, if there be any other, was really the act of the said Forest Hill Company, for deponent's wish & desire was to make the division entirely fair & satisfactory to the company, and left to it the location of the different lines of division, and was not present to give any personal directions himself. The deponent was in New York city at the time of the said survey.

The deponent further states that he held the other part of the Huddleston tract until its sale to Mr. Wyant, having a tenant on it for many years, and never had any claim set up by said Halsted, & that he several times tried to sell it to said Halsted, but said Halsted said it was of no value to him and would not buy, but deponent believes that he did once offer him ten dollars per acre; deponent further says that he instituted a suit in Fayette county, West
348 Virginia, against Long & others in order to settle up his accounts as trustee of Wm. K. Smith (or as trustee under agreement with Smith) and made said John Halsted a party to said suit, & said suit was transferred to Greenbrier county & orders of publication duly made, & that said Halsted saw said order or notice of publication against him & wrote to deponent about it, and deponent may be able to find the letter, but he has a great mass of papers & correspondence and has not had the energy to examine, but doubtless the plaintiff has his answer. The part of the Huddleston tract held by deponent was sold to Wyant, he learns, under a decree in said suit of Grinnan *vs.* Long *et al.* This deponent further says that the said Forest Hill Company never paid him for the said Huddleston tract or its part thereof, only made the first payment, and that John Halsted in 1860 or 1861 bought the bonds of the Forest Hill Company held by deponent at about fifty cents in the dollar, and deponent was subjected to great loss by reason of the failure of the said company to pay, and he learns that during the recent war between the States said Halsted ordered the Mr. Soutter, trustee of the deed of trust given by the Forest Hill Company, to secure
349 its bonds, to sell the property of the Forest Hill Company (though in a period of great distress and confusion), and bought in 2,000 acres of land called Forest Hill & the part of the Huddleston tract hereinbefore named at a very small price (about $4,000

for all, he heard), and that other holders of bonds got but little for their bonds. He believes that the widow of said Wm. K. Smith was never paid anything on some bonds held by her.

And deponent further shows that so far from said Halsted setting up any manner of claim against the part of the Huddleston tract held by deponent that in a letter to him, dated April 1st, 1882, said Halsted advised deponent to sell it (letter filed with this deposition, marked (A), and in said Halsted's handwriting), & that he believes the difference of estimate of value referred to in said letter was the difference between thirty dollars per acre asked by deponent & ten dollars per acre offered by plaintiff; and deponent further shows that at one time he did fear that said Halsted would never serve claim against him as trustee for loss of right of way through the adjoining tract called Elk Ridge; that the Elk Ridge tract was about 5,000 acres and adjoins the 2,000 acres sold to Forest Hill Company, & that the right of way through Elk Ridge was
350 essential to the working of the 2,000 acres, & that the mining of coal on the 2,000-acre tract, owing to the topography of the country, cannot be carried on through the Huddleston frontage to any advantage, if at all; that deponent had a controversy with Edwards about the 5,000-acre tract, Elk Ridge, & feared he had lost it, as by decree of circuit court of Kanawha county said Edwards had gained possession of the same, & he feared Halsted might lose his right of way through it, and so stated in a paper on file in said case of Grinnan *vs.* Long, but afterward the court of appeals for West Virginia reversed the decree of the lower court, and it, moreover, appeared that in conveying the said Forest Hill tract of 2,000 acres to deponent by said Edwards & the Elk Ridge tract of 5,000 acres it was stipulated by Edwards that the Forest Hill tract should have the right of way through Elk Ridge tract, so that in no event could Halsted loose the said right of way, and the fears of deponent were groundless, all which will appear by reference to deeds on record in Fayette Co. & the papers in suits referred to; and deponent further says that the statements made by him of his own knowledge are true to the best of his knowledge & belief after lapse of
351 so many years, & that the statements made by him on information he believes to be true; & further this deponent sayeth not.

Oct. 8, '87.

A. G. GRINNAN.

I, John G. Williams, a notary public in and for the county of Orange and State of Virginia, do hereby certify that the foregoing deposition was duly subscribed and sworn to before me by A. G. Grinnan this 8th day of October, 1887.

Witness my hand and official seal this 8th day of October, 1887.

[SEAL.] JOHN G. WILLIAMS, *N. P.*

Fee	$1 00
Seal	1 00

$2 00, costs of deposition

(Endorsed:) Received under seal, opened, and filed this 28th day of September, 1887. Teste: J. Y. Moore, cl'k D. C. U. S., D. W. Va.

352 The letter referred to in and filed with the foregoing deposition and marked (A) is in the words and figures following, to wit:

"Switzerland of America," Mansion house.

MAUCH CHUNK, PA., *April 1st*, 1882.

Dr. A. G. Grinnan.

DEAR SIR: Your letter of yesterday just received.

One of the Bustee suits was decided in my favor some time ago; the other has not yet been reached for trial.

In regard to the purchase of the property referred *in* too in your letter, I have no idea of purchasing at the price you have hitherto asked for it. Its value in my estimation has not increased since my correspondence with you on the subject some years ago, and if I was situated as you are in regard to that property I would have sold it long ago for the best offer I could get. Our ideas of value in that direction are so wide apart that I don't — how it is possible for you and I to come to terms on that question.

Very truly yours, JOHN HALSTEAD.

(Endorsed:) (A.) Filed with deposition of A. G. Grinnan in Halsted *vs.* Wyant, &c.

353 *Deposition of Thomas S. Robson. Filed Oct.* 13, 1887.

To Mr. John Halstead:

You are hereby notified that on the 28th day of September, in the year 1887, at the law office of L. G. Gaines, in the town of Fayetteville, county of Fayette and State of West Virginia, between the hours of 10 a. m. and 6 p. m. of that day, we shall proceed to take the depositions of Mr. Thomas S. Robson and others, to be read as evidence in our behalf in a certain suit in equity depending in the district court of the United States for the district of West Virginia, sitting at Charleston, in said State, wherein we are defendants and you are plaintiff, and if from any cause the taking of the said depositions be not commenced, or if commenced be not concluded on that day, the taking thereof will be adjourned from time to time, at the same place and between the same hours, until the same shall be completed.

WM. WYANT & OTHERS,
Defendants, by Counsel.

Fayette C. H., W. Va., Aug. 22nd, 1887.

354 I accept service of the within notice for John Halstead.
A. BURLEW.

Sept. 20th, 1887.

The deposition of Thomas S. Robson, taken before me, J. H. Gaines, a notary public in and for the county of Fayette, State of West Virginia, at the law office of L. G. Gaines, in the town of Fayetteville, in said county, on the 28 day of September, 1887, between the hours of 10 o'clock a. m. and 6 o'clock p. m., pursuant to the annexed notice, to be read in evidence on behalf of the defendants, in a certain suit in chancery depending in the district court of the United States for the district of West Virginia, sitting at Charleston, in said State, wherein Wm. Wyant and others are defendants and Jno. Halstead is plaintiff.

Present: J. F. Broun and L. G. Gaines, for defendants; A. Burlew, for plaintiff.

T. S. ROBSON, a witness of lawful age, being by me first duly sworn, deposed and said:

Ques. 1. State your name, age, residence, and occupation.

Ans. 1. Thomas S. Robson; age, 67; Fayette county; surveyor and farmer.

355 Ques. 2. What position, if any, in 1861 did you hold in the county of Fayette?

Ans. 2. I was county surveyor in 1861.

Ques. 3. Are you acquainted with the tract of land known as the Huddleston tract, situate on the north side of Kanawha river, below the mouth of Armstrong creek, a portion of which was conveyed by Grinnan to the Forest Hill Mining and Manufacturing Company?

Ans. 3. I am.

Ques. 4. Did you assist in laying off that portion of the Huddleston tract granted by the said Grinnan to the said company; and, if so, when and at whose instance?

Objected to because leading by counsel for the plaintiff.

Ans. 4. I did assist about the year 1859 or '60 in laying off said land. Both parties were represented, and I did it at the instance of both parties or their representatives. I think both parties agreed to it.

Ques. 5. In what capacity did you act in assisting in partitioning said Huddleston tract of land?

Ans. 5. I acted in the capacity of surveyor.

356 Ques. 6. Under what instructions from the parties as such surveyor did you proceed to lay off that part of the Huddleston tract granted by the said Grinnan to the said company?

Ans. 6. I was required to lay off one hundred acres, to be on the west side of said Huddleston tract, together with about five acres of a tract, lying fronting the Huddleston tract, of (32½) thirty-two and one-half acres, known as the L. H. Brannon survey. I was also required to divide the front line on the river equally between the Forest Hill and Elk Ridge tracts, giving each 70 poles, and before going to the field I platted both the Huddleston and Brannon surveys on paper and drew the division lines between the Forest Hill and Elk Ridge tracts so as to cut off one hundred acres of the

Huddleston tract and about five acres of the Brannon tract, making an addition of one hundred and five acres to the Forest Hill tract. This I had to do on paper in order to get the courses and distances of the division lines.

Ques. 7. What platting you did before actually going upon the Huddleston tract for the purpose of laying off the grant from Grinnan to the company—did you show it to any parties present
357 who were interested; and, if so, to whom; and was there any objection made by any one, and have you the original platting that you made?

Ans. 7. All parties present interested must have seen and agreed to it, or I should not have run the said division lines. I think I have the original platt which I made and took to the field with me, and which I herewith file as part of my deposition, marked "T. S. R. No. 1."

Ques. 8. Is this the same platt (here referring to exhibit marked "T. R. S.") which you exhibited to the parties before laying off the grant from Grinnan to the company and by which you afterwards actually ran the lines of said grant?

Ans. 8. It is my opinion that it is. If not, it is an exact copy.

Ques. 9. After laying off the grant from Grinnan to the company according to said platt did you furnish to the company or its agents a copy of your work; and, if so, how soon after its completion?

Ans. 9. I must have done it, but when I don't remember. I always do that when parties require them.

(Answer objected to by counsel for the plaintiff because not evidence.)

Ques. 10. Did you, as county surveyor of Fayette county,
358 in 1861 make a map showing the lands of the Forest Hill Company and upon said map locate the relative position of the grant from Grinnan to said company as laid down in your map marked T. R. S.; and, if so, at whose instance did you make said map?

Ans. 11. I did make such a map, and I did it at the instance of H. & R. Eames. I did it from the 6th to the 10th of February, 1861. H. & R. Eames were the agents of the Forest Hill Mining and Manufacturing Company. One of them, I think it was Richard, accompanied me on the survey.

(Here the witness files map, marked "T. S. R. No. 2," as a part of his deposition.)

Ques. 12. Was there ever any objection made by the company or any of its agents to the boundary lines as laid down by you to the grant from Grinnan to the company as platted in exhibits marked "T. S. R. No. 1" and "T. S. R. No. 2"?

Ans. 12. There was no objection then, I remember, prior to the war. Since the war, but only, I think, a few years back, Dr. C. F. Hale has made some objections, but I don't remember just exactly what they were.

Ques. 13. State more definitely what you mean by "since the war, but only, I think, a few years back."

359 (Question objected to by counsel for plaintiff because the answer referred to is not ambiguous and needs no explanation.)

Ans. —. I was there surveying a few years ago, locating the western line of the Huddleston survey, at the request of Dr. Hale and Wm. Wyant, and Dr. Hale then told me that he thought the division lines were not correctly laid down on the maps as he thought they should be.

Ques. 14. State whether or not the Forest Hill Mining and Manufacturing Company took possession of that part of the Huddleston tract laid down by you in the exhibits marked T. S. R. No. 1 and T. S. R. No. 2, and which was granted by Grinnan to the company; and, if so, when, and what was the character of its possession.

Ans. 14. It is my opinion they took possession at once and went to work. The company mined coal and very soon commenced making oil.

Ques. 15. Did the company, upon any part of the Huddleston tract as laid off by you to be held in severalty, erect any buildings; and, if so, about how many and what were they?

360 Ans. 15. Yes; an oil factory for manufacturing oil from coal; also a number of houses for their employés and a house in which Dr. Hale now resides.

Ques. 16. State what, if any, possession the Forest Hill Company took or had of that portion of the Huddleston survey which was laid off to Grinnan by the division line which you run, as stated by you.

Ans. 16. None at all. I know that because I was the agent of Grinnan until he sold the land.

Ques. 17. Please name the tenants or parties who were on the Grinnan part under Grinnan and locate as well as you can where they lived.

Ans. 17. James Janett. He lived on the south end of that part of the Huddleston tract laid off to Dr. Grinnan.

Ques. 18. How long was he there as tenant under Grinnan?

Ans. 18. There was no writing to show that he was a tenant of Grinnan at all, only a verbal contract between him and myself that he should hold it or remain there until orders from Grinnan or his successors to give it up. He was there over 15 years—from

361 the end of the war until he died.

Ques. 19. How far did he live from the division line run by you?

Ans. 19. About two hundred yards, I think.

Ques. 20. How close did his clearing or enclosure go to the division line of the Huddleston tract?

Ans. 20. About 50 yards, as well as I can remember.

Here the deposition of Mr. Robson was adjourned for dinner.

Present: Attorneys for both parties.

Cross-examination by A. BURLEW, attorney for plaintiff:

Ques. 1. Where was Exhibit "T. R. S. No. 1" made?

Ans. 1. At the house, I think, of Geo. P. Huddleston.

Ques. 2. How far was the house of Geo. P. Huddleston from the Huddleston tract?

Ans. 2. From a quarter to half a mile.

Ques. 3. Was A. G. Grinnan present when you made this platt No. 1 or any part of it?

Ans. 3. I am not certain about it.

Ques. 4. If he was not present at that time did he not see
362 you about making this division a short time before it was made? Give your best impressions whether he was present or not.

Ans. 4. My impression is that I knew nothing of a division of the property to be made until the morning I went there to survey it. Geo. Huddleston sent a messenger for me, and they were all boarding at his house. I can't tell whether Dr. Grinnan was there or not; there was some one there to represent him. From my note book showing that a man by the name of Kinney acted as paymaster I think it very doubtful that Dr. Grinnan was there.

Ques. 5. Was not the entry made in your note book concerning a man by the name of Kinney acting as paymaster for Grinnan made several days or some time after plat "No. 1" was made by you at the house of Geo. Huddleston?

Ans. 5. It was made afterwards, of course; how many days I cannot tell; it was not very long; it might have been made before I left the neighborhood.

363 Ques. 6. Is it not possible, then, that A. G. Grinnan was present at the house of Geo. Huddleston and advised with you concerning the making of platt "No. 1," and yet left the neighborhood before you made the actual survey on the ground?

Ans. 6. I don't remember whether he was there or not.

Ques. 7. Give the names of the persons whom you recollect to have been present when platt No. 1 was made or to whom you showed it before you made the division in accordance with that platt.

Ans. 7. I can only give positively the name of one man—Mr. Huddleston, of whom Grinnan bought the land. I am very sure that all parties were represented or I should not have run the lines.

Ques. 8. Do you mean that all parties were represented when you ran the lines or represented when you made this platt?

Ans. 8. When I made the platt, of course.

Ques. 9. And still you say you recollect but one man who was present when you made the platt?

Ans. 9. I recollect that there were a number of persons
364 present representing both sides, but their names and who they were I do not remember. Dr. Hale may have been there, but I do not remember it.

Ques. 10. What papers did you have before you when you made platt No. 1?

Ans. 10. I don't remember; there was a deed from Richards, perhaps, to Huddleston. I had the papers representing the Huddleston tract; also the papers concerning the Brannon tract of 32 acres.

Ques. 11. Did you have the deed before you from A. G. Grinnan & others to the Forest Hill Mining and Manufacturing Company for the Forest Hill tract of 2,000 acres, as shown on your platt filed, marked "No. 2," at the time you made platt No. 1?

Ans. 11. I suppose not. I had no use for it in making platt No. 1.

Ques. 12. Is there anything in platt No. 1 to show whether that portion of the Huddleston tract laid off to the Forest Hill Company binds on or connects with the Forest Hill tract of 2,000 acres or not?

Ans. 12. There is not.

Ques. 13. At the time this platt No. 1 was made, or at the
365 time the division line was run in accordance with that platt, was there anything said to you by any representative of the Forest Hill Company or by any one in their presence that a survey, according to that division, would separate the part laid off to the Forest Hill Company from the Forest Hill tract of 2,000 acres?

Ans. 13. Not that I remember.

Ques. 14. Is it not a fact that Grinnan or his agent requested you to lay off the Huddleston tract, and that they paid you or agreed to pay you for it?

Ans. 14. I suppose they did or I should not have done it. My impression is and my recollection is that all agreed to it.

(That part of the answer which is not responsive to the question objected to by counsel for the plaintiff.)

Ques. 15. Do you wish to change any of the answers you have made on cross-examination as to who were present when platt No. 1 was laid off at the house of Huddleston?

Ans. 15. No, sir; I don't know that I do.

366 Ques. 16. Was anything said to you by Grinnan or his representatives or by the representatives of the Forest Hill Company that you should lay off the Huddleston tract to the Forest Hill Company so as to violate the calls in the deed from Grinnan and others to the Forest Hill Company, which requires the Huddleston tract to be so laid off that it shall bind on the Forest Hill 2,000-acre tract?

Ans. 16. Not that I remember of.

Ques. 17. Is it not possible that you were requested by Grinnan or his agent to simply lay off the Huddleston tract so as to give to the Forest Hill Company about 100 acres of the western part of said tract, and is it not probable that this was done without taking into consideration at the time whether the tract so laid off would touch the Forest Hill tract or not and without any reference to the Forest Hill tract of 2,000 acres?

Ans. 17. I knew nothing about the 2,000 at that time.

Ques. 18. Who were present when you ran the lines dividing the Huddleston tract?

Ans. 18. Don't remember the names of any persons.

367 Ques. 19. Is it not a fact that the Forest Hill Company interested itself in the division you made of the Huddleston tract so far only as the lines extended back from the river a short distance so as to enable them to place their buildings on their own land along the river with certainty, which they were then anxious to do, and was not this the main reason why the division was made at that time—that the company wanted to erect their buildings?

Ans. 19. I don't remember anything about that except that I was required to divide it equally on the river and to run to a back line for quantity.

Ques. 20. When you laid off the Huddleston tract, in 1859, do you recollect running through a clearing near the south end of the tract called "Jubal Jiles' clearing"?

Ans. 20. No; I do not. I recollect running near Janett's clearing, but do not think I ran through it.

Ques. 21. Do you mean to be positive that you did not run through this clearing or is it simply an impression that you did not do so?

368 Ans. 21. I don't remember certainly, but I am under the impression that I did not.

Redirect examination:

Ques. 1. To what extent does the whole Huddleston tract bind on the Forest Hill 2,000-acre tract?

Ans. 1. I don't regard it as binding on it at all; it merely corners with it.

Ques. 2. What were you specially directed by the vendors and vendees to regard in laying off the grant from Grinnan to the company?

Ans. 2. The Huddleston tract back to the Gallatin line or to Huddleston's back line, which is the Gallatin line.

Ques. 3. When did you become the agent of Dr. Grinnan as to the Huddleston tract of land, and how long did you continue as such?

Ans. 3. I was agent from about 1867 or 1868 until it was sold.

Recross-examination:

Ques. 1. Examine the plat marked No. 2, filed by you with your deposition, and point out the lines on said map which represent the Forest Hill tract of 2,000 acres.

369 Ans. 1. It begins at A, the back corner, and runs to two sugar trees and dogwood, thence to D and C and thence with the top of the mountain to B, thence to A.

Ques. 2. Does not, then, the Huddleston tract border on the Forest Hill tract of 2,000 acres from the point B to Fig. 4 on said map and corner to Huddleston?

Ans. 2. Yes; as laid down on this map it does.

Ques. 3. Then have you not made a mistake in the answer you made to the first question propounded to you by counsel for defendant in redirect examination when you say it merely corners with it?

Ans. 3. Having surveyed the land east of the lines from 4 to B as belonging to the Busters, who claimed from 4 to 5, I *as* assuming 4 and 5 as corners to Busters, which is the Gallatin line to which the Busters claim, I think I am right in saying it only corners at 4 with the 2,000 acres; but if B on the Wilson line be the correct corner to the 2,000 acres, then a space along the mountain from B to 4 borders with the Huddleston tract.

370 Ques. 4. Is it not a fact, then, that you laid off the Huddleston tract to the Forest Hill Company so as not to bind on to the two-thousand-acre tract, and if the deed from Grinnan and others to the Forest Hill Company for the 2,000-acre tract calls for the Wilson line and calls for the Huddleston tract to be so laid off to the Co. that it shall bind on the Forest Hill tract, have not the calls of said deed been disregarded in laying off the Huddleston tract?

Ans. 4. To my recollection I knew nothing of the deed. All that I was required to do was to lay off the line on the river front equally between the Forest Hill and the Elk Ridge, extending to the back line of the Huddleston survey so as to contain one hundred acres, as shown by map marked No. 1. It was not disregarded by me.

Answer objected to by counsel for pl'ff because not responding to the question.

Ques. 5. Assuming that the Forest Hill tract of 2,000 acres extends to the Meson line A B on said map, and that the deed from Grinnan and others calls for the Huddleston tract to be so laid off to

371 the company that it shall bind on the Forest Hill tract of 2,000 acres, in laying off said Huddleston tract has not the deed been violated?

Ans. 5. Not by me as surveyor, because I laid off the 100 acres as required and agreed to by all present before I ran the division lines, not knowing anything of the deed spoken of at the time. The deed itself will better express whether it has been violated than I can.

That part of answer not responsive to question objected to by counsel for pl'ff.

Ques. 6. Is that the only answer you can make to that question, and do you think you have answered the question when you answered in the way you have?

Ans. 6. I don't know what better I can do, believing that the court can better answer that question than I can.

Ques. 7. Assuming that the Forest Hill tract of 2,000 acres borders on the Huddleston tract from 4 to B, as laid down on said map, and that the deed referred to calls for the Huddleston tract to be so laid off to the company that it shall bind on the 2,000-acre tract, has that been done in your division of the Huddleston tract?

372 Ans. 7. It has not, because I was not required to do so.

Last part of answer objected to by counsel for pl'ff.

Ques. 8. State what representative of the Forest Hill Company

agreed that you should lay off the Huddleston tract as laid down in your plat*t* marked No. 1.

Ans. 8. I have stated that, in my opinion and to my knowledge, both parties were represented when I laid off the plat*t*.

Ques. 9. Please state, then, who represented the company when that plat*t* was laid off.

Ans. 9. I have before stated that I cannot recollect.

Ques. 10. You say in your answer above to the 7th question: "It has not, because I was not required to do so." Did any member or agent of the Forest Hill Company instruct you not to lay off the Huddleston tract according to the calls of the deed from Grinnan referred to?

Ans. 10. I know nothing about it, for all present agreed to the way in which I did run it. None of them required me not to do it nor to do it. They all saw this map before there was a chain put upon it or put upon the land.

373 Ques. 11. Whom do you mean by all, and name a single representative of the company who was present and agreed to that map before the survey was made or after?

Ans. 11. I have often talked with Dr. Hale afterward and also with the two Mr. Eames's, agents for the company, none of whom ever expressed themselves to me as being dissatisfied with the hundred-acre tract as laid down on map No. 1 until a few years ago Dr. Hale did express himself as dissatisfied and claimed, I think, that the line from the letter A, which I now make to B on map No. 1, should have extended to C instead of to D, and then with the top of the mountain or the Buster line to E, the poplar corner to Buster on the Gallatin line; but I told him that would give him more than the hundred acres, and I was required to only run out a hundred acres extending to the back line.

Ques. 12. When did you last see the two Eames's or either of them?

374 Ans. 12. During the year 1861, after the commencement of the war. I don't know that I saw certainly both of them, but I did one, and was often in company of both up to the war. One of them was on the survey of the 2,000 acres with me.

Ques. 13. Do you think the Forest Hill Company would have purchased and paid for ninety-five acres of land, which amount is covered by an interlock of the Wilson and Gallatin grant, as shown on map No. 2, if they thought they were getting no title to this land?

Ans. 13. I don't suppose they would.

Ques. 14. Who owned the land lying west of the Huddleston tract and also lying west and adjoining the Forest Hill tract at the time you laid off the Huddleston tract?

Ans. 14. I think Maj. J. G. Paxton owned west of the Huddleston tract or the party of whom he bought. It now belongs to Tule's heirs. I am not sure he owned it at the time I made the survey.

Ques. 15. Did not Dr. Grinnan own an interest in the land lying west of the Forest Hill tract?

Ans. 15. Not to my knowledge.

375 Re-redirect examination:

Ques. 1. When and where was it that you had the conversation with Dr. Hale in your 11th answer next above in which he claimed that the line from A on Exhibit No. 1 ought to have been run to C instead of D?

Ans. 1. A few years ago; not over 10 years, I think. I think it was at his house where he now resides, on the portion of the Huddleston tract laid off to the Forest Hill Company, or possibly on *the* a portion of the Brannon tract of 32 acres, which was laid off to the company.

Re-recross:

Ques. 1. Have you not stated that Dr. Hale complained that you had not laid off the Huddleston tract properly several years ago in the presence of Wm. Wyant when you were engaged in running the Paxton line?

Ans. 1. I did state that he told me that, and that at another time he told me what I have stated above.

And further this deponent saith not.

T. S. ROBSON.

NOTE.—The objections above stated to ans. 4, recross-examination, to ans. 5 of same, & to ans. 7 of same are made in pencil on the original deposition.

L. B. DELLICKER, *Cl'k.*

376 COUNTY OF FAYETTE, }
State of West Virginia. }

I, J. H. Gaines, a notary public in and for said county, do hereby certify that the foregoing deposition was taken before me at the time and place mentioned in the caption thereof.

J. H. GAINES,
N. P., Fayette County, West Virginia.

Notary's fees, 10 hours, $7.50.

J. H. GAINES, *N. P.*

The reading of the foregoing depositions & certificate *are* objected to by counsel for the complainant because they do not conform to the act of Congress under which they were taken & made.

A. BURLEW,
Att'y for John Halsted.

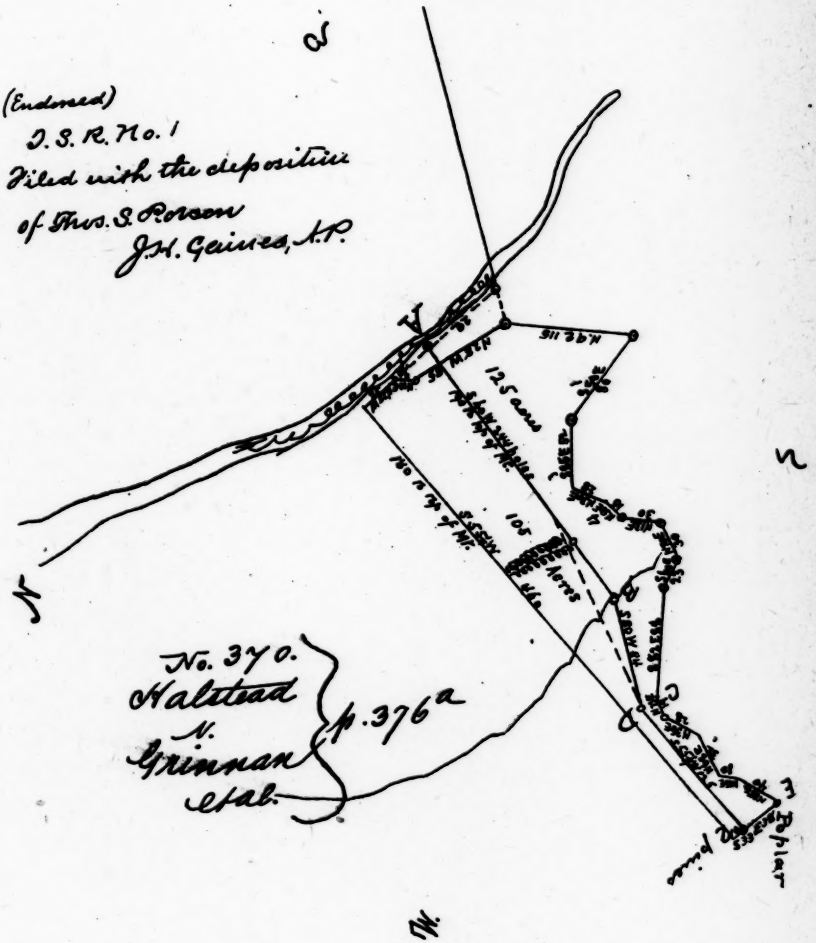
Oct. 31, 1887.

(Endorsed:) Received under seal, opened, and filed this 13th day of October, 1887. Teste: Jasper Y. Moore, cl'k D. C. U. S., D. W. Va.

The exhibits referred to in the foregoing deposition are as follows:

(Here follow maps marked pp. 376*a* & 376*b*.)

(Endorsed)
D. S. R. No. 1
Filed with the deposition
of Thos. S. Person
J. H. Gaines, N.P.



377 Deposition of R. M. Eames, filed on the 25th day of ——, 1887.

Notice to Take Depositions.

To William Wyants, A. G. Grinnan, & others:

Take notice that on the 22nd day of October, A. D. 1887, between the hours of 9 o'clock a. m. and 6 o'clock p. m., at the Farrish house, at Charlottesville, Virginia, I will take the deposition of Richard M. Eames and others, to be read as evidence in my behalf in a certain suit in equity now pending in the district court of the United States for the district of West Va., at Charleston, in which suit I am plaintiff and you & others are defendants. If from any cause the taking of said deposition shall not be commenced or completed on the day aforesaid the same shall be continued from day to day or from time to time, at the same place and between the same hours, until the same shall be completed.

JOHN HALSTED.

By A. BURLEW.

Service accepted for Wm. Wyant Oct. 8th, 1887.

J. F. BROUN.

378 Service accepted for A. G. Grinnan, F. B. Chewning, and John W. Harris, comm'r, Oct. 10th, 1887.

JOHN W. HARRIS, *Att'y.*

To John W. Harris, Esq., att'y, &c.:

On account of the uncertainty of R. M. Eames being able to be at Charlottesville, Va., on the 22nd of October, according to the notice you have accepted for me, *and* give his deposition in the case of Halsted against Grinnan & others, pending in the district court at Charleston, W. Va., I wish to change the notice so as to take the deposition at the law office of Mr. Singleton Diggs, in Lynchburg, Va.

Please consider the notice changed from Charlottesville, Va., to Lynchburg, Va., at the office above named. No other change is made in the notice. Time, 22nd October, 1887.

A. BURLEW.

Oct. 13, 1887.

Service accepted of the within notice Oct. 14th, 1887.

JOHN W. HARRIS, *Att'y.*

To J. F. Brown, att'y, &c.:

On account of the uncertainty of R. M. Eames being able to be at Charlottesville, Va., on the 22nd of October, according to
379 the notice you have accepted for me, *and* give his deposition in the case of Halsted against Grinnan & others, pending in the district court at Charleston, W. Va., I wish to change the notice so as to take the deposition at the law office of Mr. Singleton Diggs, in Lynchburg, Va. Please consider the notice changed from

Charlottesville, Va., to Lynchburg, Va., at the office above named. No other change is made in the notice. Time, 22nd October, 1887.

Yours, &c., A. BURLEW.

Oct. 13, 1887.

Accepted for Wm. Wyant.

J. F. BROUN, *Att'y.*

Oct. 13, 1887.

Deposition of Rich'd M. Eames, taken before me, Randolph Harrison, a notary public for the city of Lynchburg, State of Virginia, pursuant to notices hereto attached, at the office of Mr. Singleton Diggs, Lynchburg, Va., on Saturday, Oct. 22d, 1887, between the hours of 9 a. m. and 6 p. m., to — read in evidence on behalf of the plaintiff in a certain suit in chancery depending in the district court of the United States for the district of
380 West Virginia, at Charleston, wherein John Halstead is plaintiff and A. G. Grinnan & others are defendants.

Present: A. Burlew, for John Halstead.
" L. G. Gaines, " Wm. Wyant.

The witness, RICH'D M. EAMES, being first duly sworn, deposeth and saith:

1st Ques. by A. Burlew. State your age, residence, & occupation.

Ans. 55 years; Salisbury, N. C.; mining & mechanical engineer.

2d by same. In what business are you now engaged?

Ans. Mining.

3d by same. Where were you and what were you doing in the years 1859 and 1860?

Ans. I was in the Kanawha valley, on the Forest Hill property, Fayette county, Va. I was a mechanical engineer and engaged there in my profession.

4th by same. By what company were you employed during those years?

Ans. The Forest Hill Company. I think it was called Forest Hill Mining & Manufacturing Company.

5th by same. How early in the company's history were
381 you connected with it and what was the company engaged in doing?

Ans. It was quite a new concern when I became connected with it. I think it was formed in June, 1859, and I went into its employment in July of that year. The company was engaged in mining coal and making ore.

6th by same. Do you recollect the time T. S. Robson, surveyor, laid off or attempted to lay off, in 1859, what is known as " Huddleston " tract of land so as to give to the Co. that part which it had purchased from A. G. Grinnan & others?

Ans. Yes.

7th by same. Did you accompany T. S. Robson in making his division of the said tract of land in 1859?

Ans. No.

8th by same. Did you have a brother connected with the company during the *the* two years you were connected with it, in 1859–'60?

Ans. Yes, sir.

9th by same. Did he accompany T. S. Bobson when he attempted to lay off the said "Huddleston" tract, in 1859, so as to give the company the part it had purchased?

Ans. My impression is that he did not accompany him.

382 10th by same. Who was president of the Co. at that time?

Ans. Dr. Chas. F. Hale.

11th by same. Where was he at the time Robson attempted to lay off said Huddleston tract, in 1859?

Ans. I think he was in New York.

12th by same. Were you acquainted at that time with the complainant, John Halstead?

Ans. Yes, sir.

13th by same. Where was he at the time Robson attempted to lay off the said land?

Ans. In New York.

14th by same. Examine the map I now show you, filed with the deposition of Chas. F. Hale taken in this cause, marked "Exhibit B," and state when and where you first saw that map or a copy of it.

Ans. I think some time in the fall of 1859, at Forest Hill, in the office. It was put up against the wall the first time I saw it.

15th. Were you with T. S. Robson when that map was made or these lines run?

Ans. No.

16th. Was Chas. F. Hale, John Halstead, or your brother with him when that map was made or these lines run?

383 Ans. No; I don't think any of them were with him.

17th. State how sure you are that they were not with him.

Ans. Hale and Halstead were in New York. My brother was at Forest Hill, on the works.

18th. How sure are you that your brother did not accompany Mr. Robson in making this survey?

Question objected to by counsel for defendant Wyant for the reason that it calls for information from the witness which can better be obtained from his brother.

Ans. I don't remember that he did.

19th. T. S. Robson says in substance in his deposition given in this cause that both parties were represented when he laid off the Huddleston tract, in 1859, and he thinks both parties agreed to it. State whether these statements are true or not and what you have to say about them.

Question objected to by counsel for defendant Wyant for the rea-

son he has already stated he was not personally present at the time the survey was made, and his answer must, therefore, be merely hearsay.

Ans. All that I remember is there was no conversation with me in regard to laying off that tract.

20th. Examine the map filed with the deposition of T. S. Robson, marked "T. S. R. No. 1," and state if you ever saw that plat
384 or if, to your knowledge, any member of the company ever saw it before T. S. Robson laid off the Huddleston tract, in 1859.

Ans. I don't remember ever to have seen a map like that, and, so far as I know, no member of the company ever saw it.

21st by same. T. S. Robson says in his deposition that before going to the field to lay off the Huddleston tract he platted it off on paper at the house of George Huddleston; that both parties were present and agreed to the plat, and that the map last referred to is the plat made at Geo. Huddleston's house, in pursuance of which the survey was made. State what you have to say about that.

Question objected to by counsel for defendant Wyant for the reason that it calls for information which the absence of the witness at the time referred to by Robson prevents him from answering.

Ans. The only thing I can remember — that he was there to show us the corners on the front land. I saw no plat nor anything.

22. Do you mean the corners of the Huddleston tract on the river?

Ans. Yes, sir.

23. Do you mean to say that he was on the ground to show you these corners on the tract on the river or at the house of George Huddleston?

385 Ans. On the ground.

24. Were you or any member of the company, to your knowledge, at the house of George Huddleston when he was making a plat of the Huddleston tract previous to his laying it off, in 1859?

Ans. I don't remember any one being there.

25. T. S. Robson says that plat No. 1 was made at the house of Geo. Huddleston just before going on the field to lay off the tract. Was it possible for Dr. C. F. Hale or John Halstead to be there at this time?

Ans. My impression is that neither of them were there at that time.

26. If they were not there what other member of the company could have been there to represent the company?

Ans. My brother.

27. Was your brother present at the house of George Huddleston when the plat referred to was made?

Question objected to by counsel for defendant Wyant for the reason that his absence from Huddleston's house at the time referred to prevents him from being competent to answer the question.

Ans. I don't know.

28. Would he have had any authority to consent to the making of a survey inconsistent or in violation of the deed from Grinnan & others to the company for the land in question, so as to bind the company, if he had been there?

386 Question objected to by counsel for defendant Wyant for the reason that it calls for information relative to transactions by the company which can be otherwise proved and which the position of the witness, as mining engineer for the company, in nowise qualifies him to answer.

Ans. I think not.

29. During the two years that you were at Forest Hill did you ever hear a member of the company say that he was present when the map last referred to was made at the house of George Huddleston or elsewhere or present when the survey was made in pursuance of it?

Ans. No.

30. Is it true, therefore, or not that the Forest Hill Company agreed to the division made by T. S. Robson as laid down on map No. 1 before the survey was made?

Question objected to by counsel for defendant Wyant for same reasons stated in his objection to question No. 28.

Ans. I don't know anything about it.

31. From all the circumstances connected with the matter—the absence of Halstead & Hale & your presence at Forest Hill at the time and the fact that you never heard it mentioned by any
387 one that he had agreed to such a division—what is your opinion as to whether the Forest Hill Co. ever agreed to such a division as is made on plat No. 1 before the survey was made?

Question objected to by counsel for Wyant because it is incompetent, asking merely for the opinion of the witness.

Ans. My opinion is that the company would not have agreed to such a division.

32. If your brother had no authority to consent to a division of the Huddleston tract in violation of the calls of the deed from Grinnan & others to the company, what other member of the Co. was present to make such a consent or agreement that would bind the Co.—I mean present at Forest Hill at the time?

Question objected to by counsel for Wyant for the reason that it contains a supposition of the fact in this, that the brother had no authority to consent to the division made by Robson or a matter about which the witness is incompetent to speak.

Ans. There was no other member present that I remember.

33. State from your knowledge of the capacity your brother was employed by the company he would or would not have had the

power to have consented to a division of the Huddleston
388 tract in violation of the calls of the deed referred to so as to bind the company.

Question objected to by counsel for Wyant upon the grounds and for the same reasons made to question No. 31.

Ans.. No; I should say he would not have had such power.

34. Do you know the capacity in which your brother was employed by the Co.?

Ans. Yes; he was superintendent.

35. T. S. Robson says he was requested to divide the land equally on the river and to run back for quantity. Why did the company want their lines located on the river at that time?

Ans. So as to locate the buildings.

36. Did the company at that time take any interest in the division made by Robson of the Huddleson tract except to know where the lines would run on or near the river so as to know where to locate the buildings?

Ans. That was all; they wanted to know where to put their buildings.

37. Robson says also in his deposition that after he laid off the Huddleston tract he talked with Hale and Eames about it and none of them expressed any dissatisfaction with it until some time after Dr. Hale made some objection to it. What have you to say to this?

389 Ans. I don't remember anything that was said.

38. A. G. Grinnan says in his deposition that Dr. Hale, a brother-in-law of the plaintiff, was present representing the plaintiff and the company at the time Robson laid off the Huddleston tract, in 1859. Is that statement true or not?

Ans. I don't know.

39. What is your judgment about it?

Question objected to by counsel for Wyant for reasons hitherto made to question 31.

Ans. I should say it was not true.

40. Can you not recall some incident that happened at that time that satisfies you Dr. Hale was in New York when the plat was made by Robson, in 1859?

Ans. Yes; he was called away about that time by sickness in his family and was gone several weeks.

41. Who was sick and what was the result of the sickness?

Ans. His wife was sick and she died.

42. What is there to indicate from Exhibit B filed with the deposition of Chas. F. Hale that the land described in the said plat does not bind on the Forest Hill 2,000-acre tract?

Ans. It doesn't show anything but just the plain survey.

390 43. Is there anything on the face of said plat or paper to indicate that the land embraced in said tract does bind on the Forest Hill 2,000-acre tract?

Ans. No.

44. When did you first discover or ascertain that that portion of the Huddleston tract laid off to the Forest Hill Co. did not bind on the Forest Hill 2,000-acre tract?

Ans. When we run the 2,000-acre tract, in the spring of 1860 or '61, as near as I can remember.

44. Who run the 2,000-acre tract in 1860 or '61?

Ans. Robson. I was with him, and I think one of the Huddlestons, a white man by the name of Jubal Giles, and two negroes.

45. What did T. S. Robson say when he found out in making a survey of the 2,000 acres, in 1860 or '61, that it did not connect with that portion of the Huddleston tract theretofore laid off by him to said company?

Ans. I have a recollection that he said while we were on top of a mountain when we struck the Wilson line that the west line of the Huddleston tract would intersect the 2,000-acre tract and cross a clearing made by Jubal Giles and a bear trap on said clearing. I remember that conversation as we went on with the line.

46. Was there any other clearing on the southern end of the Huddleston tract except the one you have referred to?

391 Ans. I don't remember.

47. Was this clearing on the part laid off to the company or on the part retained by Grinnan, or on both?

Ans. I don't know.

48. Examine the map filed with the deposition of T. S. Robson, marked "T. S. R. No. 2," and state if the division of the Huddleston tract *is* there laid down has been so divided as that that part laid off to the Forest Hill Co. binds on the Forest Hill tract of 2,000 acres.

Ans. No; it does not.

49. Examine the deed from A. G. Grinnan & others to the Forest Hill Co., marked Exhibit "B" and filed in this cause, and state how the division of the Huddleston tract was required to be made and whether or not in making the division by T. S. Robson he has violated the calls of said deed.

Ans. The division called for by the deed was as follows: "Also a certain piece or parcel of a certain tract of land known as the Huddleston tract, to be surveyed off the western side of said tract by line running from the northerly to the southerly side of said tract, to be bounded on the south by the tract hereinabove conveyed and on the north by the Great Kanawha river, containing one hundred acres, more or less." According to the plat, Robson has vio-

392 lated the calls of said deed.

50. Is there any difficulty in laying off the Huddleston tract according to the calls of said deed so as to give to the company that part of the same which it purchased by said deed, so that the southerly part thereof shall bind on the Forest Hill tract of 2,000 acres; at the same time to divide the frontage equally on the river?

Ans. I cannot see from the survey but what it could be divided.

51. From your knowledge of the location of the land is there any

difficulty in making such a division of the Huddleston tract as stated in the previous question?

Ans. Nothing to prevent it.

52. When you ascertained that the two tracts of land did not connect with each other in 1860 or '61, when you were with Robson surveying the 2,000-acre tract, what did you say about it to him at that time?

Ans. I stated to him at that time to run according to the deed from Mr. Grinnan to the company and nothing else.

53. Point out on map marked "T. S. R. No. 2" the beginning corner at which you started and the lines you ran.

Ans. Beach corner to 6 A, thence to B, then with the di-
393 viding ridge to C, thence crossing creek to D, thence crossing the creek to 2 sugar trees & dogwood, thence to 6 A.

Cross-examined by counsel for Wm. Wyant:

1 X Ques. Was your connection with the company before or after the survey made by Robson as shown on plat marked "T. S. R. No. 1," filed with his deposition?

Ans. I don't know. I never saw that plat before.

2 X Ques. Was your connection with the company before or after the division of the Huddleston tract made by Robson as platted on exhibit marked T. S. R. No. 1?

Ans. Prior to Exhibit B, filed with the deposition of Mr. Hale. That is the only plat I ever saw.

3 X Ques. Besides your position as engineer was there any other relationship existing between yourself and the company?

Ans. I was assistant secretary *pro tem.* at Forest Hill at one of the meetings in 1861. That is all the connection I had with said company except that of engineer.

4 X. How soon after the division of the Huddleston tract made by Robson and to what extent did the company improve that portion of its property?

394 Ans. I can't remember the time, but they put up several buildings for workmen. It was in the fall and, I think, the year was 1859.

5 X. Do you state positively that no member of the company or any of its agents were present at Huddleston's house at the time Robson made the plat marked "B," filed with Chas. F. Hale's deposition?

Ans. To the best of my recollection, only my brother was there.

6 X. Do you state positively that no member of the company or its agents were not present with Robson at the time he ran the lines as indicated on plat marked "B"?

Ans. I don't remember any one being there but my brother.

7 X. When did you first see the survey marked "T. S. R. No. 2" and at whose instance was it made?

Ans. I don't remember when I first saw the survey nor do I know anything about at whose instance it was made. I had nothing to do with that only when I was sent with him (Robson) to run the lines.

Re-examined by counsel for Halstead:

1 question. When were the improvements and buildings
395 which you refer to in your cross-examination made on the Huddleston tract?

Ans. On the river front south of the road.

2. Was not this the only available place on which improvements such as these made by the company in 1859 could have been made?

Ans. Yes; the only place.

3. What was the character of that portion of the Huddleston tract after it left the bottom land on the river?

Ans. Rough mountain land—steep.

4. Were any other improvements made by the company for its business on this rough back land?

Ans. Yes; mines were opened—coal veins—an inclined railroad built, and a dwelling-house—all on the north side of the road.

5. How far back from the river did they extend?

Ans. Between fifteen and eighteen hundred feet, as near as I can recollect.

6. You have stated in several places in your examination-in-chief that your brother was not at the house of Geo. Huddleston when plat marked T. S. R. No. 1 was made nor when the survey was made laying off the Huddleston tract in 1859. Do you wish to
396 change any of these answers? If not, what do you mean by saying on X examination, in answer to 5th question, "To the best of my recollection only my brother was there"?

Ans. Well, real-y I don't know exactly where he was, whether he was in the office or whether he was over there. To the best of my recollection I don't know.

7. Did you ever hear your brother speak of this plat marked T. S. R. No. 1, and did you ever hear him say anything that would indicate to you that he was present with Robson when he laid off the Huddleston tract in 1859?

Question objected to by counsel for Wyant for the reason that the brother is yet in being from whom this information should be obtained.

Ans. No.

8. Again I repeat, did your brother have any authority from the company to have the Huddleston tract laid off in controvention to the deed from Grinnan to the company.

Objected to by counsel for Wyant for the same reasons & upon the same grounds made to the same question propounded above.

397 Ans. None that I know of.

9. If you know of anything else important to either side of this case state it.

Ans. I know of nothing further.

Further this deponent saith naught.

RICHARD M. EAMES.

VIRGINIA, *City of Lynchburg,* } *To wit:*

I, Randolph Harrison, a notary public for the city of Lynchburg, in the State aforesaid, certify that the foregoing deposition of Richard M. Eames was duly taken, subscribed, and sworn to before me and was reduced to writing by me at the time and place in the caption mentioned, and that I am not related to any of the parties to said controversy and have no interest in the result of the suit, and that I am not an attorney in the cause.

[SEAL.] Given under my hand and official seal this 22d day of October, 1887.

RANDOLPH HARRISON,
Notary Public.

Witness Fees.

Mileage, 200 mi's	$20
One day	1 50
	21 50

Notary's Fees.

Deposition	5 00
Affixing seal, &c.	50
	5 50

P'd by A. Burlew.

398 *Depositions of John L. Cole & Charles F. Hale. Filed on the 31st Day of October,* 1887.

Notice to take depositions.

To A. G. Grinnan, F. B. Chewning, John W. Harris, com'r, and Wm. Wyants:

Take notice that on the 24th day of October, A. D. 1887, between the hours of 9 o'clock a. m. and 6 o'clock p. m., at the custom-house, in the city of Charleston, W. Va., I will take the deposition of John L. Cole and others, to be read in evidence in my behalf in a certain suit in chancery now pending in the district court of the United States for the district of West Virginia, at Charleston, in which suit A. G. Grinnan is plaintiff and Sydney C. Long *et al.* are defendants. If from any cause the taking of said deposition shall not be commenced or completed on the day aforesaid, the same shall be continued from day to day or from time to time, at the same place and between the same hours, until the same shall be complete.

JOHN HALSTED.

A. BURLEW, *Att'y.*

399 Service accepted for William Wyant.

J. F. BROUN, *Att'y.*

Service accepted Oct. 19th, 1887, for F. B. Chewning, A. G. Grinnan, and John W. Harris, com'r.

JOHN W. HARRIS, *Att'y.*

Depositions of witnesses taken before the undersigned authority in and for Kanawha county, in the State of West Virginia, at the custom-house, in the city of Charleston, West Virginia, on the 24th day of October, 1887, between the hours of 9 o'clock a. m. and 6 o'clock p. m. of that day, pursuant to the annexed notice, to be read as evidence in behalf of John Halstead, one of the defendants in a cause pending in the district court of the United States for the district of West Virginia, at Charleston, wherein A G. Grinnan is plaintiff and Sydney C. Long *et al.* are defendants.

Present: A. Burlew, attorney for defendant John Halstead.
Do. L. G. Gaines & J. F. Broun, for Wm. Wyant.

By agreement of parties the taking of these depositions is
400 adjourned from the custom-house to the law office of A. Burlew, on Capitol street, in the city of Charleston, W. Va.

JOHN L. COLE, a witness, being first duly sworn, deposes as follows in answer to questions propounded to him:

1st question by A. Burlew, att'y for Halstead. State your profession or professions, how long you have been engaged in both or either, as the case may be.

Ans. One is surveyor of lands; I have been engaged in that, off and on, thirty-odd years. My other is lawyer, principally in land cases; I have been engaged in that, but not regularly, for about twenty years.

Ques. 2. Examine the copy of deed from Wm. K. Smith and wife and A. G. Grinnan and wife to the Forest Hill Mining Co., filed in this cause, dated 15 June, 1859, and state if you have any acquaintance with the land therein described.

Ans. I know the location of the land and the character of the country in which it lies; have done some surveying on the Gallatin and Wilson line in its front.

Ques. 3. Do you recollect of doing some surveying on that part of the land described in the said deed as the Forest Hill front tract, near the river, in the suit between John Halstead and the Ches. & Ohio R. R. Co., some 12 or 15 years ago?

Ans. Some 12 or 15 years ago I went with Mr. Burlew to
401 the house of Dr. Hale, and we made some measurements about the old Forest Hill factory, about the turnpike on the front of the Huddleston tract.

Ques. 4. Examine the deed referred to and the map filed with the deposition of T. S. Robson, marked "T. S. R. No. 2" and filed in the suit of John Halstead ag'st A. G. Grinnan & others, and state if there is any difficulty, in your judgment, in laying off to the Forest Hill Mining & Manufacturing Company that portion of the Huddleston tract which said Co. purchased by the deed aforesaid from A. G. Grinnan & others so that the part so laid off to the company

purchased by it from Smith & Grinnan, and who procured T. S. Robson and paid him for laying off the said land in 1859?

Question objected to.

Ans. Under the agreement of Smith & Grinnan with the Forest Hill Co. it was their duty to lay off this portion of the Huddleston tract that belonged to the Forest Hill Co. under their deed. This they did, employing the then county surveyor, T. S. Robson, to do it. To the best of my information and belief they paid him for his services. Neither I nor any one else on behalf of the Co. paid him.

Quest. 10. Did they lay off said tract according to the calls of said deed?

Ans. No; they did not. The deed calls for the junction of the Huddleston part with the Forest Hill proper. This was not done, as the maps will show.

Quest. 11. Were any members or representatives of the Forest Hill Co. with T. S. Robson when he laid off said land, in
407 1859, after he left the river or bottom land adjoining the river and ascended the mountain?

Ans. Not to my knowledge. There was certainly no one there who was authorized either to accept or reject the lines that he run.

Quest. 12. At that time how far did the Forest Hill Company interest itself as to where the dividing line between the two divisions of the Huddleston tract would run, and where was it that the said company erected its buildings and improvements?

Ans. They paid little attention to the dividing lines, supposing it was all right, and run according to the map that was given us. The buildings, improvements, and machinery were erected on the northerly side of the tract.

Quest. 13. How far running southward from the river did it actually know where the dividing line ran? I mean in 1859, where it erected its buildings.

Ans. We merely took Robson's survey. I don't know.

Quest. 14. Did the Co. know in 1859 or have any reason to suppose that Robson had not laid off said land according to the calls of said deed?

Ans. No; they had none. In fact, it was not until long afterwards, I think about 1864 or 1865, that I had any knowledge of it.

408 Quest. 15. When did A. G. Grinnan first set up any claim to that strip of the Huddleston tract which separates the part laid off to said company from the Forest Hill 2,000-acre tract?

Ans. I don't know.

Quest. 16. So far as you know, did he make any claim to the said strip of land before the same was sold by John W. Harris, com'r in the suit of Grinnan and Long, then pending in the circuit court at Lewisburg?

Ans. Not to my knowledge.

Quest. 17. William Wyant says in his deposition given in the case of Halstead & Grinnan, herein referred to, that he had a con-

versation with you the second day after he purchased the easterly part of the Huddleston tract from John W. Harris, com'r (under decree made in this cause), and that you did not in that conversation suggest any controversy concerning the division line. What have you to say to this?

Ans. Mr. Wyant's statement is perfectly correct. I said nothing of the kind, for the reason that I was not sure then what course it would be necessary to take with Grinnan with regard to it, and, moreover, I thought then and think now that it would be impossible for Grinnan to give a good title to the property. The property has been claimed by several persons, among others William
409 H. Edwards, who, to the best of my information, sold off all the timber on it some time ago.

Quest. 18. William Wyant says in his said deposition that in 1880 he had a conversation with you concerning the getting of some rock on the northern end of the Huddleston tract, and that you said to him that the rock had been pretty well gathered on the Forest Hill land, but that he could get some rock from land adjoining, and that it belonged to a man living in Virginia. Where, if at all, did the conversation take place, and what part of the Huddleston tract which belonged to the man living in Virginia did you refer to where he could get the stone or rock?

Ans. I have no recollection of any such conversation. I don't intend to deny it, but don't remember it at all.

Quest. 19. If the conversation did occur as stated by him, what part of the Huddleston tract retained by Grinnan was it that you referred to where he could get rock? Was it the northern or southern part?

Question objected to because witness says he has no recollection of such conversation.

Ans. It must have been the southern part.

Quest. 20. What makes you think it must have been the southern part?

Ans. I think so, because I knew all the rock had been
410 gathered off the Forest Hill portion. I had used it myself, and besides that I had ordered my sup't to write to Grinnan for permission to gather rock off that tract of his.

Quest. 21. Would you have referred Mr. Wyant to A. G. Grinnan as the proper authority from whom to get permission to take rock from any portion of the land in controversy which separates that part of the Huddleston tract laid off to the Forest Hill Co. from the Forest Hill 2,000-acre tract?

Ans. No; certainly not.

Quest. 22. Did you have any knowledge that any part of this land in controversy in this suit which separates the company's lands, as hereinbefore stated, was involved in the suit of Grinnan against Long & others, in Greenbrier county, before Mr. Wyant made his purchase, in 1882 or 1883?

Ans. No; I did not.

Quest. 23. T. S. Robson says in substance, in his deposition given

in the case of Halstead & Grinnan, that both parties were present when he laid off the land, in 1859. What have you to say to this?

Ans. Mr. Robson is entirely mistaken. I was not there. I was in New York.

411 Quest. 24. Was any party present for the Forest Hill Min'g & M'f'g Co. who had authority to consent for the said company to the laying off said land contrary to the calls of said deed from Smith & Grinnan?

Ans. No one.

Quest. 25. A. G. Grinnan says in his deposition that Dr. Hale, meaning you, J. McKinney, a nephew of Judge Cowan, a stockholder, was present with Robson when he laid off the land, in 1859, yet he acknowledges that he was in New York. What have you to say to this?

Ans. I certainly was not here. As for McKinney I don't know. McKinney had no connection with the company except to draw up some legal papers, and he certainly had no authority to act for the company in any way.

Quest. 26. How have you occupied the company's lands since John Halstead became the purchaser of them, in 1864?

Ans. I have lived there—on the frontage of the Huddleston tract.

Quest. 27. Under whom have you occupied said land?

Ans. John Halstead.

Quest. 28. How have you claimed to hold the entire lands?

Ans. Merely as his agent.

412 Quest. 29. I mean what boundaries have you claimed to hold to.

Ans. The boundaries that are called for by the deed.

Quest. 30. Do you recollect a man occupying a small improvement on the southern part of the Huddleston tract named Jarrett? If so, please designate by a pencil line on the map filed with the said deposition of T. S. Robson, marked "T. S. R. No. 2," the place or improvement so occupied by Jarrett, how long he was there, whether as the tenant of Halstead or the Forest Hill Company, and to whom did he pay rent.

Ans. I have marked the place on the map as near as I can locate it from memory. It overlaps the Forest Hill line on one side and on the other a portion of the Huddleston tract that was deeded to the Forest Hill Co. by Grinnan. I cannot locate it exactly because I have never surveyed it. I remember the man Jarrett very well who lived there, and he paid me rent for years.

Note by notary.—The place marked in pencil referred to in this answer is a circular pencil mark between figures 3 & 4 & near the figure 4.

Quest. 31. How many years did he pay you rent, to the best of your recollection?

Ans. About twelve years, I should say.

Cross-examination:

413 1st Q. by J. F. Broun. When did you first become connected with the purchase of those lands from Smith & Grinnan, and what personal knowledge had you of the transactions which culminated in the purchase?

Ans. In 1859. I had no personal knowledge of the transactions till after the purchase.

2d Q. How long after the execution of the deed before you were personally party in anywise to the transaction?

Ans. A few days.

Ques. 3. You say on direct examination that under the agreement of Smith & Grinnan with the Co. it was their duty to lay off the portion of the Huddleston tract which belonged to the Co. Do you refer to the agreement contained in the deed?

Question objected to because there is no agreement in the deed.

Ans. It was a personal agreement, in the first place, between Smith & Grinnan & the man who was negotiating. The deed conveys one hundred acres, more or less, off the westerly side.

Ques. 4. From whom did you learn of this personal agreement and when was it made?

Ans. I learned of it from Cowan. It was just about the time the purchase was made.

414 Ques. 5. In answer to question 14 you did not know until 1864 or 1865 of the location of the lines of the 105 acres as regards the Forest Hill tract and the fact that the two tracts did not join. In your deposition in the case of Halstead *vs.* Grinnan, taken in April last, you say that in 1861 that T. S. Robson made a full survey and a map which he furnished to the company, which map showed the 105 acres formerly surveyed by him; also the Forest Hill 2,000-acre tract and the strip of land now in controversy between said tracts. State which answer as to dates you wish to correct, if either.

Ans. I don't wish to correct them at all; they are perfectly correct. The map that was made in 1861 never came into my hands till many years afterwards. I believe it was in 1865 I first saw it.

Quest. 6. From whom did you receive it and under what circumstances?

Ans. I can't tell. I have forgotten. I do know it came into my possession somewhere about 1864 or 1865.

Quest. 7. In whose possession is the said map now; and, if in yours, how long *you* have you had it?

Ans. It's in my possession. I can't tell where I got it & when it came into my possession.

Quest. 8. Please file a copy of the map.

415 Ans. Exhibit "T. R. No. 2" with Robson's deposition in the suit of Halstead against Grinnan & Wyant is a copy of said map.

Quest. 9. In whose possession has said map been since 1864 or 1865?

Ans. To the best of my recollection it came into my possession about 1867. I can't come any closer than that now. It has been in my possession since then.

Quest. 10. What possession, if any, have you ever had on the eastern side of the division line of the Huddleston tract as run by Robson?

Ans. None whatever, except from the lines he (Robson) indi*indi*cated to me.

Q. 11. Were you ever on the place where Jarrett lived?

Ans. Yes.

Q. 12. When were you last there?

Ans. Eight or ten years ago.

Q. 13. What rent did he ever pay you for the use of the place on which he lived?

Ans. He paid me in produce, and especially fruit, to the amount of about ten dollars a year.

Q. 14. Did you have any written or other agreement with him in regard to the use of the place, and when did he begin to pay rent?

416 Ans. I had merely a verbal agreement with him and I am entirely unable to say when he took possession of the place. I don't know. The first year or two he was on the land he was told he was on Bill Buster's land and paid him the rent, but after that I satisfied him he was on our land and he paid me the rent afterwards.

Q. 15. In your deposition of April last, above referred to, you state that you were acquainted with the lands on which Jarrett lived; that it was on the William Buster land. "I thought at first it was on the Forest Hill tract, but investigated and found he was on Buster's land." Please explain this apparent discrepancy.

Ans. The explanation of that will be found in the result of the case of Halstead *vs.* Buster. That is all I can say of it. I can't say anything more of it.

Q. 16. Did Jarrett live on the land in controversy in the case of Halstead ag'st Buster?

Ans. Yes; in the beginning of the trial he did, but he died before the termination of it.

Q. 17. Did he ever change his residence from the time he first went upon these lands, as stated by you, and his death?

Ans. No; he did not. I state that upon information and belief.

417 Q. 18. Was any part of the Huddleston tract in controversy or anywise involved in the suit of Halstead ag'st Buster?

Ans. No.

Q. 19. Did not Jarrett live upon the Huddleston tract during the time you knew him?

Ans. Yes, he did. The main part of his clearing was on the portion of the Huddleston tract that was supposed to belong to Grinnan, but it lapped over on both sides, partly on the Forest

Hill tract proper and partly on the Forest Hill portion of the Huddleston tract.

Q. 20. Was not the house in which Jarrett resided on that portion of the Huddleston tract which was supposed to be Grinnan's?

Ans. That I can't say.

Q. 21. Do you know where the division line runs at that part of the Huddleston survey?

Ans. Yes.

Q. 22. How long have you known it?

Ans. To the best of my recollection about 18 years.

Q. 23. Was Jarrett's house on the west or east side of that line?

Ans. I don't know.

418 Redirect examination:

1st Q. by A. Burlew. You say, in answer to 19th question in cross-ex., that the main part of Jarrett's clearing was on that part of the Huddleston tract which was supposed to belong to Grinnan. What do you mean by "supposed to belong to Grinnan"? And was it possible for the company or John Halstead to suppose that the strip of land in controversy which separates the front land of John Halstead from his back land to belong to Grinnan if they claimed to hold possession of their land according to the deed from Smith & Grinnan?

Objected to because leading, irrelevant, & otherwise illegal.

Ans. Because Bill Buster at that time claimed the property. Before the decision of the supreme court was rendered it was a matter of uncertainty who did own that strip there, and now, if I rightly understand the effect of the decision of the court, both these strips of land, the one claimed by Grinnan & the one sold to the Forest Hill Co., belonged to the Tabb heirs. Those two small strips are a portion of the old Paint Creek Company's property.

2d Q. If the Huddleston tract be divided according to the
419 calls of the deed from Smith & Grinnan, does it not carry with it to the Forest Hill Co. the greater part of both of these strips of land?

Ans. Certainly it does; it carries the whole of it.

Recross-examination:

1st Q. by J. F. Broun. Are you not mistaken in saying or supposing that any portion of the Huddleston tract was involved in the suit that you have referred to as decided by the supreme court or that Wm. Buster ever made any claim to any part of the Huddleston tract?

Ans. I was not mistaken, but my answer was misunderstood. Buster at that time did claim the Jarrett farm, altho' he had no right to it. I certainly claimed for the Forest Hill Co. the strip of land lying next to it, but if the decision of the U. S. Supreme Court establishes the Wilson line it proves that neither Grinnan nor the Forest Hill Co. had any right to these two strips of land, and as a part of the old P't Creek Co.'s lands they now belong to the Tabb

heirs. I have distinctly stated that no part of the Huddleston tract was involved in the said suit.

Further this deponent saith not.

CHAS. F. HALE.

1 day	$1 50
30 mi.	3 00
	4 50

CHARLES F. HALE, being recalled, further deposed as follows in answer to questions by A. BURLEW:

420 Question. Please examine the map which you have been referred to, marked "T. S. R. No. 2," and state if T. S. Robson, surveyor, ever pointed out to you where he run the division line from the Kanawha river back to the foot of the hill; if so, state where he pointed out this line and what trees or monuments he referred to.

Ans. Yes; he did. As I was not here when he run the line, I was uncertain where it was. Some time afterward he was present on the place and went with me and showed me where the line was located, telling me that as there were no large trees on the line itself he had marked two trees that stood the nearest to it, one a pin oak and the other a poplar, and that the line run almost exactly midway between them, and that he had marked several small trees that stood on the line, a small buckeye and paw-paw, and something else. The great poplar tree was cut down by the railroad people when the railroad was being built without my knowledge or consent. The pin oak still stands and is the only landmark that I have that marks the line. I had a conversation with Wyant about this same pin-oak tree and declined to allow it to be cut down.

421 Q. How far did the pin oak and poplar stand apart?

Ans. To the best of my recollection, about 200 feet.

Q. State whether or not there is any controversy now between you and Wm. Wyant as to where this dividing line was run by Robson, running from the river bank to the foot of the hill, and whether or not the line as now claimed by Wm. Wyant is the same line pointed out to you by T. S. Robson as you have stated.

Ans. No; it is not the same line. I think that the line cuts off a corner of his bar-room. Of this I am not sure, for the reason that the post that I planted on the line as given me by Robson has been buried up by the railroad filling.

Further deponent saith not.

CHAS. F. HALE.

Witness Fees.

1 day	$1 50
30 mi.	3 00
	$4 50

STATE OF WEST VIRGINIA, *Kanawha County,* } *To wit:*

I, L. E. McWhorter, a notary public for said county, in said State, do certify that the foregoing depositions of Charles F. Hale and John L. Cole were taken, sworn to, and subscribed before me, in my said county, at the place and times mentioned in these depositions and the caption- thereof, and that all the questions and answers were written by me except the answers to questions four, five, seven, and eight of the deposition of John L. Cole, which were written by the witness, all of which was done in my presence; and I further certify that I am not related to or kin to either or any of the parties in this cause, nor am I related to either of the attorneys in this cause and am not interested as attorney or otherwise in said cause or the result thereof.

422

Given under my hand this 31st day of October, 1887, at Charleston, W. Va.

L. E. McWHORTER,
Notary Public.

Cost of These Depositions.

Witness fees:

John L. Cole	$1.50,	paid by	A. Burlew
Chas. F. Hale	4.50 "	"	A. Burlew
Notary fees	12.50 "	"	A. Burlew

L. E. McWHORTER, *Notary.*

(Endorsed:) U. S. dist. ct., Charleston, W. Va. A. G. Grinnan *vs.* Sydney C. Long & others. In chancery. Depositions taken before L. E. McWhorter, notary (of John L. Cole & Dr. Chas. F. Hale), in above cause & by him filed with the clerk of said court at Charleston Oct. 31, 1887. Filed Oct. 31st, 1887. J. Y. Moore, cl'k D. C. U. S., D. W. Va.

423 *Depositions of Wm. Wyant, A. G. Anstead, H. J. Tucker, and John W. Harris. Filed the 18th Day of Nov.,* 1887.

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Depositions of witnesses taken before the undersigned authority for Kanawha Co., W. Va., at the law office of A. Burlew, in the city of Charleston, West Virginia, on the 24th day of October, 1887, between the hours of 9 o'clock a. m. and 6 o'clock p. m. of that day, pursuant to the agreement of parties, to be read in evidence on behalf of defendants, in the cause pending in the district court of the United States for the district of W. Va., at Charleston, wherein John Halstead is plaintiff and A. G. Grinnan and others are defendants.

Present: L. G. Gaines & J. F. Broun, for def'ts.
Do. A. Burlew, for plaintiff.

424 WILLIAM WYANT, one of the defendants, being first duly sworn, deposes as follows:

1st ques. by att'ys for def'ts. State what connection you bear to this suit, your age, residence, and occupation.

Ans. I am one of the defendants; aged 44 years; reside at Eagle, Fayette Co., W. Va.; in coal business.

Ques. 2. When and under what circumstances did you purchase the lands in the bill in this cause mentioned; and if by a map, in whose possession was the same, and what, if anything, was said at the time of the purchase regarding the lines to the land so bought?

Ans. I purchased the lands at Kanawha Falls, W. Va., at public sale, by John W. Harris, commissioner. I purchased by a map shown that day there by Mr. Harris, in whose possession it was. I asked about the map and he said it was drawn up by the county surveyor, Mr. Tucker, and was correct. This was along in April, 1883. The land was put up at public sale and I was the highest bidder, at $60.50 per acre, amounting to something over $9,000.

Ques. 3 *Ques.* 3. Examine plat now shown you, filed with the record from Greenbrier county, now endorsed "Wyant Exhibit No. 1," and state whether the lands you so bought were laid down upon the map exhibited to you by the com'r on the day of sale as the same is laid down upon said Exhibit No. 1, and whether the Forest Hill tract of 105 acres was in like manner laid down upon
425 said map.

Ans. It was, except that the map by which I bought had also lines upon it which I now represent by dotted pencil lines upon the exhibit now shown me. The dotted pencil lines are laid down from recollection and are not intended to be exact.

Ques. 4. What knowledge, if any, of any deed from Smith & Grinnan to the Forest Hill M. & M. Co. had you at the time of your said purchase covering any of the lands embraced by the 154 acres so sold to you?

Ans. I had not any.

—. When did you first learn of any claim by Halstead or the Forest Hill Company of any of the land embraced by your said purchase?

Ans. When the suit commenced. I think some two years after I purchased.

Ques. How long have you known the 154 acres so purchased by you?

Ans. Since 1877.

Ques. State what possession, if any, Halstead or his agents have had of any part of said 154 acres since you have known it.

Ans. None.

Ques. Who did have possession of it since you have known it, in person or by tenant?

Ans. Up to the time I bought it I was informed it was owned by parties living in old Virginia. Nobody lived on it. Of course,
426 when I bought it I owned it. Nobody lived on it except a man by the name of Jarrett, now deceased.

Ques. How long do you know of Jarrett living on the land, and under whom did he hold possession?

Ans. He had been living on the land ever since I had known the land, and he claimed he had been living there fifteen years before I came there, in 1877. He held possession after I bought under myself.

That part of the answer that refers to what Jarrett said or claimed objected to by counsel for plaintiff.

Ques. State what, if any, improvements you have made upon the land so purchased by you since your said purchase and their value.

Ans. About $7,000; seven thousand dollars in building houses and opening mines.

Ques. Who is the agent of Halstead on the 105-acre tract, where does he reside, and how long has he been such agent, and where has he resided during your said acquaintance, & how well have you known him?

Ans. Dr. Chas. F. Hale is the agent; he resides at Forest Hill on the 105-acre tract; he has been such agent ever since I have known him, & has resided on the tract ever since I have known him. I see him almost daily when I am at home. My place of business is about one-half mile from the 105-acre tract. I have known Dr. Hale since 1877.

Ques. When did Hale first know of your purchase of the
427 154 acres, and what, if any, conversations occurred between you in regard to your purchase and the lines of the land you bought?

Ans. Hale first knew of the purchase the second day following the sale; that was the first day he spoke to me. Hale asked me what made me pay the price I did for the land. He said he could have bought it for me for ten dollars an acre if I had asked him. I said to him, Why did you not buy it yourself when you could buy it so cheap? He answered they had all the land they wanted; they did not want it.

Ques. Did Hale on that occasion or at any other time before the bringing of this suit suggest any controversy concerning the division line between the 105 and the 154 acres?

Ans. No, sir; he never did.

parcels of land was ever pointed out to you by Dr. C. F. Hale, and state what, if anything, said Hale told you or stated in relation to said lines or corner. State all he said.

Ans. There is a large pin-oak tree about 60 or 70 feet this side of a building I occupy, that I rent from Mr. Wyant, and I asked Mr. Wyant to have this tree cut down, and I met Mr. Wyant & Dr. Hale together at the saloon and said to Mr. Wyant, You now ask Dr. about cutting this tree, and the Dr.'s reply was that it was a line tree between the Forest Hill tract and the Grinnan tract, and he couldn't have it cut.

Q. 3. How is this tree situated as regards enclosures on the Halstead land?

Ans. I should say it is from seven to 10 feet from the corner of his fence that runs up the mountain.

433 Q. 4. State how said tree stands as regards the division line of the Huddleston tract as claimed by Wyant.

Ans. The tree stands within about 10 feet from the line of Dr. Hale's fence, on Wyant's side of the fence, & Dr. Hale pointed out the tree as a line tree.

Cross-examination:

1st Q. by A. Burlew. How far are the saloon and tree you refer to from Kanawha river, and are they not on the bottom land along the river?

Ans. They lie between the railroad & the foot of the mountain, about 300 feet from the river.

And further deponent saith not.

A. G. ANSTEAD.

1 day	1 50
30 mi	3 00
	$4 50

H. J. TUCKER, witness of lawful age, being first duly sworn, deposes as follows:

1st Quest. by J. F. Brown. State your name, age, residence, and occupation and what position, if any, you filled in 1882 and now fill.

Ans. H. J. Tucker; age, 37 years; residence, Sewall Depot,
434 Fayette Co., W. Va. In 1882 I was surveyor of Fayette Co.; am State inspector of mines.

Q. 2. What acquaintance, if any, have you with the Huddleston tract of land on the south side of Kanawha river, below Armstrong's creek? And if you did any surveying on said tract in the year 1882, state what it was and under whose direction or authority.

Ans. In the summer of 1882 I made a survey of that portion of the land that was conveyed by Geo. P. Huddleston to A. G. Grin-

nan. I made the survey at the request of John W. Harris, of Lewisburg.

Q. 3. What was the surveying then done by you? Examine the map now shown you, marked "T. S. R. No. 2." If you can, indicate on said map such surveying.

Ans. I surveyed the portion marked on the map "Elk Ridge tract front 125 acres."

Q. 4. In running the northwest lines of said 125 acres dividing the Huddleston tract state what you found and by what you were guided in locating the same and if in said surveying you located said lines as indicated upon said map.

435 Ans. I was guided in locating said lines by the calls of the 105 acres as laid off by T. S. Robson. I found the first corner after leaving the river at the end of the first line a pine, chestnut, and gum on a point marked as corner trees. Near the river there was a tree shown me by Dr. Hale as being on the line of the 105-acre tract—Forest Hill front—on the division line between the 105 acres and the 125-acre tract as laid down on said map. My recollection is the tree shown me by Dr. Hale was a lynn or pin oak; I won't be certain which. The lines as located upon this map appear to be the same as located by me.

Q. 5. Did Dr. Hale at the time he showed you that line know the purpose for which you asked the information from you or otherwise?

Ans. I told Dr. Hale that I wanted to get at the Grinnan land and he went with me and showed me the line tree referred to in the preceding answer.

436 Q. 6. Did you at that time have with you the plat or survey of the 105-acre tract as made by Robson; and, if so, did Dr. Hale know of it in your conversation or otherwise?

Ans. I didn't think I had any plat with me, but had the notes of the 105 acres as laid off by Robson. I am not sure that Dr. Hale knew of it. I likely showed it to him. I naturally would have done so under the circumstances.

The last part of the ans., which is uncertain, is objected to for that reason.

Q. 7. Did Dr. Hale tell you of any controversy or dispute about any part of the division line or make any claim or intimation that the same was incorrect as run by Robson? If so, state what he said.

Ans. I don't think that he made any statement of the kind to me.

Q. 8. Upon which side of the division line as run by you and Robson did Jarrett live?

Ans. He lived on the 125-acre side.

Q. 9. What did you do with the survey when you completed it.

437 Ans. I sent the map and report to John W. Harris, to Lewisburg.

Q. 10. When did you first hear of any claim that the division line so run by you was questioned or in dispute?

Ans. I can't say exactly; I suppose a year or two ago, though.

Q. 11. Did you see Hale after you had completed the survey and before you returned the plat?

Ans. I don't think I did.

And further this deponent saith not.

H. J. TUCKER.

1 day	1 50
56 miles	5 60
	$7 10

The further taking of these depositions is continued until November 2, 1887, at same place and between same hours, by agreement of parties.

L. E. McWHORTER, *Notary.*

NOVEMBER 2, 1887.

Depositions resumed at same place pursuant to foregoing adjournment.

Present: J. F. Broun, for def't Wyant.
Do. A. Burlew, " pl'ff.

438 JOHN W. HARRIS, a witness for defendants, being first duly sworn, deposes as follows:

1st Q. by J. F. Broun. State your name, age, residence, and occupation.

Ans. John W. Harris; reside in Lewisburg, W. Va.; am 46 years of age, & by occupation a lawyer.

2d Q. State what connection, if any, you had with the suits of Chewning ag'st Long & others, and Grinnan *vs.* Cowan & others, heard together and lately pending in the circuit court of Greenbrier county, and with the sale of lands made in said causes.

Ans. I was of counsel for certain of the creditors of Wm. K. Smith, who sought in said suits to subject the trust subject in the hands of A. G. Grinnan to the payment of their debts. I was also appointed in said suits com'r of said court to make sale of the lands decreed to be sold in said causes.

3d Q. What action was had by you as such com'r to ascertain the boundaries and render definite the trust subject so decreed to be sold, and, if a survey was made of same, by whom was it made,
439 under what authority, & what use was made of said survey at the sale?

Ans. I visited Fayette county, examined the clerk's office, obtained all the title papers which I could find bearing upon the subject, furnished them or data thereof to H. J. Tucker, a surveyor of said county, whom I employed to locate and survey the land and who, in obedience to my directions, went upon the land and reported to me a map and survey thereof, which were returned by me with my report of sale to the court, under whose orders I was acting. Sale was made in accordance with said map and report, and William

No. 370.
Halstead
vs.
Spinnaw
et al.

M. 441

"J.W.H."

Wyant became the purchaser, as shown by my report aforesaid. I have examined the papers in the cause for the plat returned by me as aforesaid, but have been unable to find it. I exhibit and file herewith as a part of my answer a plat marked "J. W. H.," which, according to my best recollection and belief, is an exact copy of the one by which I sold, except that according to my recollection the plat by which I sold was lettered so as to conform to the description given in the report of the surveyor. The copy filed, as will
440 be observed, is not lettered. The $9\frac{74}{160}$ acres of land laid down on the said plat was, as will be seen by reference to my said report, given as a bonus to the purchaser; or, in other words, not being able to include said $9\frac{74}{160}$ acres in the boundaries claimed, and it seeming to be conceded there then was no other claimant to said $9\frac{74}{160}$ acres, I undertook to sell a quitclaim title only thereto.

4th Q. How was the sale made & what relation did the plat of survey bear thereto?

Ans. The sale was made at public auction and pursuant to the requirements of the decree under which I was acting, and at the time of sale the plat and report of said Tucker were exhibited to the bidders as descriptive of the subject sold.

5th Q. State, if you recollect, the price at which said land was so sold to Wyant.

Ans. The land brought something upwards of $9,000.00. I do not remember the exact amount. This will be seen, however,
441 by reference to my report of sale and to the decree confirming said report.

Further deponent saith not.

JOHN W. HARRIS.

STATE OF WEST VIRGINIA, *Kanawha County,* } *To wit:*

I, L. E. McWhorter, a notary for said county, within said State, do certify that the foregoing depositions of William Wyant, A. G. Anstead, H. J. Tucker, and John W. Harris were taken, sworn to, and subscribed before me at the times and places and as stated in the said depositions and the caption thereof; and I further certify that I am not akin to or related to either of the parties in interest in said cause or to the attorneys or either of them and am in nowise interested in said cause or the result thereof; and I further certify that the said depositions were reduced to writing by me in the presence of the witnesses and attorneys.

Given under my hand this — day of November, 1887.

L. E. McWHORTER,
Notary Public for Kanawha County, in said State.

Notary fees, 47 folio-, @ 20c., $9.40.

(Here follows map marked p. 441*a*.)

442 (Endorsed:) Depositions of Wm. Wyant, A. G. Anstead, H. J. Tucker, and John W. Harris, taken before L. E. McWhorter, notary for Kanawha county, W. Va., from Oct. 24th, 1887, to Nov. 2, 1887, inclusive. Filed Nov. 18, 1887. J. Y. Moore, cl'k D. C. U. S., D. W. Va.

443 And at another day, to wit, at a district court of the United States for the district of West Virginia continued and held at Charleston, in said district, on Friday, the 25th day of November, A. D. 1887.

A. G. GRINNAN
vs.
S. C. LONG & Others } In Chancery.

and

F. B. CHEWNING
vs.
J. F. COWAN. } In Chancery.

It appearing to the court that on the 10th day of July, 1882, a decree was entered in the foregoing causes for the sale of certain lands; that a sale of said lands was made to Wm. Wyants, and that on the 27th day of April, 1883, said sale was confirmed by the court, but that said Wyant only has an equitable title for said land; that John Halsted had been proceeded against by order of publication, and that said Halsted has filed his petition in said causes for rehearing the said decrees, on motion of said Halsted, by his attorney, a rule is awarded requiring Wm. Wyant to appear and show cause, if any he can, why the said decree of sale and decree of confirmation shall not be set aside.

444 (We do not find any memorandum, copy, or return of the rule among the papers in this cause on file in this office, but the answer to said rule is hereinafter set forth.)

445 And at another day, to wit, at a district court of the United States for the district of West Virginia continued and held at Charleston, in said district, on Wednesday, the 30th day of November, A. D. 1887.

JOHN HALSTED
vs.
A. G. GRINNAN *et al.* } In Chancery.

This day the complainant, by his att'y, tendered his amended and supplemental bill in this cause, which is ordered to be filed.

And thereupon the Forest Hill Mining and Manufacturing Co. and Robert Soutter, trustee, by their att'y, A. Burlew, appeared to said bill and waived issuing of process thereon as to them; and it being suggested that the heirs of Wm. K. Smith, dec'd, defendants to said bill, have no interest in the matter involved in this suit,

on motion of the complainant, by his att'y, this suit is dismissed as to them, and the defendants, by their attorneys, agree not to take any advantage of the complainant on the trial of this cause on the *on the* discontinuance of the cause against the said heirs of Wm. K. Smith; and William Wyant, by his attorney, appeared and waived the issuing of process on said amended and supplemental bill as to him, and thereupon A. G. Grinnan filed his answer to said supplemental bill, and the complainant replied generally thereto.

446 The amended and supplemental bill of John Halsted, referred to in the foregoing order, is in the words and figures following, to wit:

The amended and supplemental bill of complaint of John Halsted filed in the district court of the United States for the district of West Virginia, holden at Charleston, against A. G. Grinnan and others.

To the Honorable John J. Jackson, judge of said court, sitting in equity:

As an amended and supplemental bill of complaint to the bill filed by your orator in the above-entitled cause your orator, John Halsted, respectfully represents as follows: That on the first day of August, 1853, Wm. H. Edwards conveyed to Wm. K. Smith 7,000 acres of land lying on Armstrong creek, in Fayette county, Virginia and West Virginia, known as the "Elk Ridge tract." This tract of land embraces within its boundaries what is known as the "Forest Hill tract," supposed to contain two thousand acres, now

447 owned by your orator, as hereinafter set forth.

That on October first, 1857, Wm. K. Smith and wife conveyed to the defendant A. G. Grinnan, with covenants of general warranty, one undivided half of the said "Forest Hill tract," lying in Fayette county, Virginia (now West Virginia), near the waters of Armstrong creek, being that part of said tract of seven thousand acres conveyed by Wm. H. Edwards and wife to said Wm. K. Smith which will include one-half of the frontage of said tract (Elk River tract) towards the Great Kanawha river and extending thence back through the middle of the tract, &c., together with the undivided one-half of two hundred acres lying between the said tract of 7,000 acres and the Great Kanawha river, known as the "Huddleston tract." By this deed of conveyance the said Smith is granted an interest also in the remaining 5,000 acres of the said 7,000-acre tract. The attention of the court is especially called to "Exhibit C C" in the printed record of "A. G. Grinnan against S. C. Long and others" & Chew-

448 ning against Cowan, which exhibit & record, so far as they are applicable & so far only, your orator prays may be read and considered as a part of this your orator's amended & supplemental bill (see printed Record, page 79); that on the 29th day of October, 1857, Wm. K. Smith conveyed to A. G. Grinnan by deed absolute the several tracts of land as stated in the bill of A. G. Grinnan against S. C. Long and others (see said printed Record, com-

mencing on page 14), including the interest of the said Smith in the said 7,000 acres; "also the remaining half of a tract of about 200 acres of land lying on the Kanawha river below Armstrong creek, being the tract contracted to be conveyed to said Edwards for the benefit of said Smith by George Huddleston;" that, although this deed was for the lands in fee simple, there was a secret trust concerning it, as stated in the said bill of A. G. Grinnan. In this deed it will appear that Smith conveyed to said Grinnan "the remaining half of a tract of about 200 acres lying on the Kanawha river below Armstrong creek;" in other words, the remaining half of the said Huddleston tract. See copy of said deed herewith
449 filed & made a part of this bill, marked "Ex. C." It will appear by the said bill and it is true that prior to the sale of said 7,000 acres by Wm. H. Edwards to Wm. K. Smith that said Edwards had made a written contract with George P. Huddleston for the purchase of the "Huddleston tract of 200 acres" for the benefit of said Smith as an outlet for the said 7,000 acres to the Great Kanawha river, as the said 7,000 acres only came within about three-quarters of a mile of said river.

The said contract between said Edwards and Smith was entered into on the — day of ——, —, prior to Oct. 1st, 1857, and your orator has been informed that it was regularly recorded in Fayette county, in which said land lies, soon after it was executed, but your orator has not been able to find it on the records of said county. Whether said contract is of record in said county or not your orator can give no definite answer.

That on the 15th day of June, 1859, Wm. K. Smith and wife, A. G. Grinnan and wife, and A. G. Grinnan, trustee, conveyed
450 the said Forest Hill tract by deed of general warranty to the Forest Hill Mining & Manufacturing Company, being part of the said 7,000 acres as aforesaid; "also a certain piece or parcel of a tract of land known as the Huddleston tract" (being the same Huddleston tract hereinbefore referred to), to be surveyed off the the western side of said tract by a line running from the northerly to the southerly side of said tract, to be bounded on the south by the tract herein conveyed (Forest Hill tract) and on the north by the great Kanawha river, and containing one hundred acres, more or less. By this deed it was intended by all parties interested in the land therein conveyed to divide the "Huddleston tract" in equal parts, so as to give the western half to the Forest Hill Company, and thus give an outlet for the Forest Hill tract to the Kanawha river. The said Huddleston tract had been conveyed by the owner and purchaser as a tract containing about 200 acres, and it was purchased by halves by said Smith, as hereinbefore shown, and was described as a tract containing 200 acres, and the words "more
451 or less" were inserted in said deed to the Forest Hill Mining and Manufacturing Company for the purpose of securing to said grantee one-half of whatever the number of acres in said tract exceeded 200 acres, and to confine it to one-half of the number of acres therein should it be found that the tract contained less than 200 acres; that without this construction, independent of any out-

side evidence, the words "more or less" would have no meaning & there would be no sense in using them.

That at the time Smith and Grinnan made said sale of land to the Forest Hill M. & M. Co., in 1859, they exhibited said land by a report and map, purporting to have been made by Dr. J. H. Salisbury, which map they represented as showing the true location of the Elk Ridge tract, the Forest Hill tract, the Huddleston tract, and their relation to each other, and the report as showing the quality of the lands, minerals, &c. The lines represented by the figures 5, 6, 7, 8, and so back to 5 on said map were reported by Smith
452 and Grinnan to *to* said company to correctly represent the Huddleston tract and its relations with the Kanawha river and the Forest Hill tract; that said deed was made by them on the 15th day of June, 1859, in conformity with this map, and said report, map, and deed were presented to said company by Smith and Grinnan practically as one paper, and the said company believed that said report and map correctly represented the quality and location of the lands purchased by it. By reference to said map it will be seen why it was that the western part or half of the Huddleston tract was conveyed to the Forest Hill Mining and Manufacturing Company, and also why it was that the eastern part or half was retained by Smith and Grinnan. The Elk Ridge tract was then owned by Smith and Grinnan & the eastern half only of the Huddleston tract would border on that tract and the western half only would border on the Forest Hill tract. The said report and map are filed in this cause, marked "A," and your orator prays
453 that they may be read and considered as a part of this bill.

Your orator says also that on the 27th day of October, 1860, George P. Huddleston executed and delivered to A. G. Grinnan, in his own right and as trustee for Wm. K. Smith, a deed of conveyance for the said Huddleston tract, "containing 200 acres, be the same more or less," in accordance with the aforesaid contract made between Wm. H. Edwards and Wm. K. Smith for the purchase of said land. This deed was admitted to record in said county of Fayette on the — day of October, 1860, a tested copy of which is herewith filed and made a part of this bill, marked "Ex. A."

That on the 15th day of June, 1859, the day on which Smith & Grinnan executed to the Co. the deed for the lands, the Forest Hill M. & M. Co. executed a deed of trust to Robert Soutter, trustee, for the lands embraced in said deed from Smith and Grinnan to said Forest Hill Company, which deed was also admitted to record in said county of Fayette on the 27th day of June, 1859, a copy
454 of which deed is filed with your orator's original bill, marked "Ex. D."

The last-mentioned deed was given to secure the payment of some individual notes and 80 of said company's bonds for $500 each, 28 of which were to become due in 1862, 26 of same in 1864, and the residue thereof, 26 in number, in 1867, and the proceeds of the sale of the company's lands were to be distributed, 1st, to the payment of the said notes, the 28 bonds due in 1862, and the 26 bonds due in 1864, *pro rata*, and after they should be fully paid and satisfied,

then, second, to the payment of the 26 bonds falling due in 1867; that your orator owned all of the 1st & 2nd series of bonds except three.

That on the 6th day of June, 1864, the said company's lands were sold under the said deed of trust by Robert Soutter, trustee, and on the same day he executed and delivered to your orator a deed for said lands embraced in said deed of trust; a tested copy of which deed is herewith filed and made a part of this bill, marked "Ex. E."

455 That shortly after the purchase of said land by said company in 1859 A. G. Grinnan, whose duty it was under his agreement with said company to have the part of the Huddleston tract purchased by said company properly laid off to it by a proper survey, undertook to so lay it off, or proposed to do so, and said company supposed he had complied with his agreement and had run the division lines of the Huddleston tract properly so as to give to said company the land it had purchased, until it was discovered some time, several years after the war, that, by a survey the company had made in 1861, a serious mistake had been made by T. S. Robson, the surveyor whom Smith and Grinnan employed to divide the Huddleston tract in 1859; that the mistake was not sooner discovered on account of the excitement which took possession of the people very soon after the survey was made, in fact had already taken possession of them, and continued until the close of the war in 1865,

456 during most of which time the employees and representatives of the company were compelled to abandon said property.

The company did not resume its operations after the war & took no interest in its property thereafter, and steps were taken to close up its business, which resulted in a sale of its lands as above stated, so that said company had no occasion to examine the lines run by T. S. Robson in 1859, except to see that they were properly run for a short distance back from the Kanawha river, about 1,000 ft., where it was interested and about to locate its buildings for the manufacture of coal-oil, and erect the necessary dwelling-houses for its officers and employees, and where it did so erect them. It took no part in running the division lines in 1859 except to see that they were properly run through the bottom land on the Kanawha river, for the reasons above stated, and did not accompany said surveyor any further on his survey, but said company supposed, as a matter of course, until the mistake was discovered by it, that A. G. Grinnan had had the Huddleston

457 tract divided according to the requirements of his deed to and agreement with said company.

Verry soon after the running of the division line by T. S. Robson through the bottom land lying along said river in 1859 the company took possession of the whole lands purchased by it from Smith and Grinnan according to the calls of its deed from them by erecting buildings for the manufacture of oil, dwelling-houses, &c., and various other improvements on the land laid off to it by the said surveyor along said river, running as far back as the foot of the hill or mountain, a distance, as above stated, of about one thousand feet,

and by occupying the said improvements & other improvements on the land purchased by said Co. by actual occupancy, notoriously claiming the whole of the land embraced in its said deed according to the calls thereof, except during a period of the war, when it was compelled to abandon them until said lands were purchased
458 by your orator in 1864, since which time your orator has been in continuous, uninterrupted, & undisputed occupancy of the whole of said lands by actually and openly occupying the same to the present time, notoriously claiming them to the same exterior lines as claimed by said company according to the calls of said deed of June 15, 1889.

As soon as said company became aware of the fact that in laying off the Huddleston tract in 1859 the surveyer had disregarded the requirements of the deed from Smith and Grinnan to the company, and by mistake or by a misdirection by Smith and Grinnan had laid off said land in violation of said deed, it repudiated that part of the survey which disregards the requirements of said deed, and in like manner your orator has repudiated said survey since he was informed of the said error. The map filed with the deposition of T. S. Robson, marked "T. S. R. No. 2," was made from a survey made by said
459 Robson in 1861, and your orator believes that it shows correctly the location of the Forest Hill tract of 2,000 acres and the Huddleston tract and the division made by him in 1859 and their relations to each other. Your orator avers that he saw this map for the first time in about 1867. It will be seen by this map, which is asked to be read and considered as a part of this bill, that the division of the Huddleston tract made by T. S. Robson in 1859 is so made that the part retained by Grinnan intercepts *intercepts* that part laid off to the Forest Hill Co. from the Forest Hill tract of 2,000 acres, so that they do not join each other. Your orator says the first time he has any recollection of Grinnan ever setting up any claim to the strip of land which separates the part of the Huddleston tract laid off in 1859 from the Forest Hill tract of 2,000 acres was in 1883, after the sale had been made to Wm. Wyants, as hereinafter stated, and even then he did not claim ownership of
460 said strip of land, but he refused to make any correction on the plea that the Forest Hill Co. had defaulted in the payment of their bonds, and said, as your orator was then the owner of the property, he (your orator) stood in the company's shoes and could not ask a court of equity to correct the error made by the surveyor in 1859, because of the failure of the company to pay all their bonds—they could not ask relief. There may be equity in Dr. Grinnan's reasoning, but your orator has not been able to discover it.

Your orator has been informed since the filing of his original bill in this cause that in the year 1878 A. G. Grinnan filed his bill in the circuit court of Fayette county, West Virginia, against S. C. Long and others, and that about the same time F. B. Chewning filed his bill in said court against J. F. Cowan, which causes, your orator is advised, were consolidated and removed to the circuit court of Greenbrier county in the year 1880; that the object of said suits

461 was for a settlement of the trust estate held by said Grinnan in Fayette county.

That on the 10th day of July, 1882, a decree was made in said causes for the sale of the said trust estate, and John W. Harris, Esq., was appointed a special commissioner by the said circuit court of Greenbrier county, with directions to sell the said trust estate, including one undivided half of the tract called "the Huddleston tract," and the said special commissioner in executing said decree sold the one undivided half of said property, according to a division he had had made, to Wm. Wyants, and reported the said sale to the court for confirmation as a sale of the "one undivided half of the Huddleston tract," ascertained to contain 154⅛ acres, and a parcel of $9\frac{74}{160}$ acres lying adjacent to said Huddleston tract, amounting to $163\frac{52}{160}$ acres; that the part of the Huddleston tract sold by said commissioner to said Wm. Wyant is that part lying east of the division line as represented on the map heretofore referred to as "T. S. R. No. 2." In other words, said commissioner sold according

462 to the division line run by Robson, surveyor, in 1859, which includes land which had been conveyed to said company by the deed of June 15, 1859, thus separating the one-half of said tract purchased by the Forest Hill M. & M. Co. from the Forest Hill 2,000-acre tract & violating the said decree of 10th July, 1882; that said Wyant has not paid the last instalment of purchase-money for said land, amounting to about $3,500, with considerable interest thereon, and only has an equitable title therefor.

Your orator says he was made a party to said suit of Grinnan against Long and others by order of publication and was not served with process, being proceeded against as a non-resident, and that he did not appear to the cause before said sale or confirmation of sale for the reason that he was informed by A. G. Grinnan that said suit did not affect your orator's interest in any way, but that your orator had been made a party thereto as a mere matter of form, and

463 your orator avers that he had no knowledge that any part of the lands he owned or was interested in was being proceeded against or involved in said suit until after said sale had been made to Wm. Wyant on the — day of ——, 1883, & confirmed.

Your orator says also that on the 1st day of November, 1886, he presented to the circuit court of Greenbrier Co. his petition for rehearing the proceedings had in said cause of A. G. Grinnan against S. C. Long & others (consolidated with said cause of Chewning against Cowan), including the decree for the sale of the "one undivided half of the tract called the Huddleston tract" and the decree for the confirmation of the sale made by said commissioner, dated the 27th of April, 1883, as above stated, and accompanied his petition with an undertaking, as required by the statute in such cases, and said undertaking was approved by said court and said petition filed, and thereby in effect the said decrees of sale and confirmation

464 were set aside as to your orator, and your orator is admitted to make defense against said decrees as if he had appeared in said cause before the same were rendered. Tested copies of the said petition & undertaking, the order filing the same, and of the said

decrees of sale and confirmation are herewith filed and made a part of this bill, numbered from figure 1 to figure five, inclusive, respectively in the order above stated.

It appears, therefore, that Wm. Wyant had constructive notice that in the year prior to Oct. 1st, 1867, Wm. H. Edwards entered into a written contract with George P. Huddleston, for the benefit of Wm. K. Smith, for the purchase of the Huddleston tract; that said Wyant had also constructive notice at the time he purchased the land in controversy that in accordance with said contract Wm. K. Smith, on the 1st day of October, 1857, conveyed, among other lands, one-half of the Forest Hill tract and "the undivided
465 half of the Huddleston" tract to A. G. Grinnan.

That said Wyant also had constructive notice that on the 29th day of October, 1857, said Smith conveyed to A. G. Grinnan by deed, among other lands, "the remaining half of 200 acres of land," being the remaining half of the Huddleston tract.

That said Wyant had actual knowledge of all the conveyances referred to in this bill and of the location of the lands therein conveyed with reference to each other, including said written contract for the purchase of the Huddleston tract for the benefit of Wm. K. Smith as an outlet for the 7,000-acre tract, and the said deed from Smith and Grinnan to the Forest Hill M. & M. Co., dated June 15, 1859, for all said deeds and contract were fully set out & referred to in the record of the causes through which he made his purchase from Commissioner Harris, as above stated, and the law forced upon him knowledge of what the record of said causes contained, and he will not be permitted to evade such knowledge by a denial
466 that *that* he had knowledge of your orator's title and by pretending that he was an innocent purchaser without notice of your orator's title to the land he purchased.

Your orator is advised and so charge- that Wm. Wyant cannot hold any part of the land he purchased from said commissioner which had been conveyed by Smith and Grinnan to said Forest Hill Mining & Manufacturing Company by said deed of June 15, 1859, because he had both actual and constructive notice of the sale and conveyance of said land to said company.

Second. Because he is not a *bona fide* purchaser without notice of your orator's title; he has not the legal title to the land, nor has he paid the purchase-money therefor.

Third. Because he purchased from one (Grinnan) who had notice of your orator's title to the land, and your orator was in open possession of the land by actual and undisputed occupancy, claiming to the entire extent of his boundaries, which was notice sufficient to put the purchaser (Wyant) on inquiry.

467 Fourth. Because at the time the survey was made by T. S. Robson, in 1859, the company's entire property had been conveyed to a trustee to secure the payment of a large number of its bonds and several promissory notes, amounting to over $40,000.00, and said property was then held by said trustee for the payment of said notes and bonds, which was a bar to any charge being made

even by the consent of the company that would depreciate the value of the property.

Fifth. Because his purchase, so far as he claims land which had been conveyed to said Co. by said deed of June 15, 1859, is in violation of the decree under which he made his purchase.

Your orator believes and charges that the said causes were removed from the circuit court of Fayette county to the circuit court of Greenbrier county through the influence of some one interested in said causes for the purpose of putting them where your orator would not be likely to know that your orator's lands were
468 involved therein, as your orator had an agent looking after your orator's interest in Fayette county and an attorney who practiced there.

Sixth. Your orator further avers and charges that Wm. Wyant, so far as he claims lands under his said purchase which had been conveyed by Smith and Grinnan to the Forest Hill M. & M. Co. by the deed of June 15th, 1859, is not an innocent purchase and his purchase is tainted with fraud.

Your orator asks to be read and considered as a part of this bill, as if especially incorporated herein, all that part of your orator's original bill not inconsistent herewith.

Your orator is advised that a court of equity will look at the necessity that exists on the part of your orator to have the land itself which he purchased and paid his money for; that the land itself is most indispensible to your orator, and without it great injustice and damage will be done him, and your orator is informed that
469 it is among the first principles of a court of equity to correct mistakes and to prevent parties from being injured in their property, and especially their freeholds by a misapprehension or concealment of the true facts.

Your orator therefore prays that the said sale of land in question to William Wyant, so far as it affects your orator's rights therein, be set aside and held for naught, and that the undivided half of the Huddleston tract purchased by the Forest Hill Mining and Manufacturing Company be laid off to your orator according to the said deed from Smith and Grinnan, dated the 15th of June, 1859, and the intention of the parties thereto; that A. G. Grinnan, the Forest Hill Mining and Manufacturing Company, Robert Soutter, trustee; Wm. Wyant, and the unknown heirs of Wm. K. Smith, dec'd, be made party defendants to this bill and be required to answer the same; that process be issued against them, &c.; and your orator prays such other and more general relief as may be con-
470 sistent with equity and justice; and your orator will ever pray, &c.

JOHN HALSTED.

A. BURLEW, *Sol.*

STATE OF WEST VIRGINIA, *Fayette County,* } *To wit:*

Charles F. Hale, being by the undersigned first duly sworn, says he is the agent of John Halsted, the complainant in the foregoing

bill, and that he knows the contents of said bill; that the facts and allegations therein contained are true except such as are stated therein upon information and belief, and that as to such allegations he believes them to be true.

That this bill is not prepared for the purpose of vexation or delay; that the matter of amendment and supplement in said bill is material to the complainant on the trial of the same and could
471 not with reasonable diligence have been sooner introduced.

CHAS. F. HALE.

Taken, sworn to, and subscribed before me this 14 day of November, 1887.

THOS. WHARTON,
N. P., Fayette Co., W. Va.

NOTE.—The Exhibits "A," "B," "C," "D," & "E" referred to in the foregoing amended & supplemental bill are attached to original bill in said cause and are set forth at length in this record after said original bill. The Salisbury map, also referred to, is attached to the deposition of Chas. F. Hale, herein set forth. The copies of the petition, undertaking, order, and decrees referred to in the above amended & supplemental bill and therein stated to be filed with same, "numbered from 1 to 5, inclusive," are not found so marked among the papers, but will be found included in the record from Greenbrier Co., herein set forth.

L. B. DELLICKER, *Cl'k.*

472 The answer of A. G. Grinnan to the amended and supplemental bill of John Halsted, referred to in the foregoing order, is in the words and figures following, to wit:

The separate answer of A. G. Grinnan to an amended and supplemental bill of complaint exhibited by John Halstead in the district court of the United States for the district of West Virginia, sitting at Charleston, against this respondent and others.

This respondent, saving and reserving to himself the benefit of all exceptions to the many errors and imperfections of said bill, for answer thereto refers to his answer heretofore filed to the original bill of said complainant, which answer he prays may be taken and read as a part of this answer in the same manner and to the same extent as if the same were herein fully set forth.

And for further answer to said amended and supplemental bill this respondent admits the execution of the deed from Wm. H. Edwards to Wm. K. Smith, dated August 1st, 1853, the deed from said Smith and wife to this respondent, dated October 1st, 1857,
473 and the deed from said Smith to this respondent dated October 29th, 1857, in said bill mentioned, but he denies that the references to the Huddleston tract of land mentioned in said deeds and the descriptions thereof in the record of the suits of Grinnan *vs.* Long and Chewning *vs.* Cowan in anywise related to or were descriptive of any interest of the Forest Hill Mining and Manufactur-

ing Company or of John Halstead in said Huddleston tract, and says that these references and descriptions merely related to the interests in said tract which were conveyed to this respondent, the said Smith having by the first deed aforesaid conveyed one-half of said Huddleston tract to this respondent for his own benefit and by the second deed aforesaid the remaining half upon a secret trust for the benefit of certain creditors of said Smith, whose rights have been adjusted and fully determined by the proceedings had and taken in the suits of Grinnan *vs.* Long and Chewning *vs.* Cowan aforesaid.

This respondent denies that the alleged contract between Wm. H. Edwards and Wm. K. Smith in said bill mentioned was ever admitted to record in the county of Fayette, as alleged in said bill.

This respondent admits the execution of the deed of 15th June, 1859, from Wm. K. Smith & wife and A. G. Grinnan & wife
474 and A. G. Grinnan, trustee, to the Forest Hill Mining and Man'f'g Company, but he denies that it was intended by the parties interested that said deed should convey or divide the said "Huddleston tract in equal parts, so as to give the western half to the said company." He denies that said tract "was purchased by halves by said Smith;" and he denies that the words more or less in said deed to said company *was* "for the purpose of securing to said grantee one-half of whatever the number of acres in said tract exceeded 200 acres," as alleged.

This respondent denies that the portion of the Huddleston tract sold by him to said company was run off to said company as the act of this respondent only, but he says that in the year 1859 and shortly after the sale to said company the said company and this respondent, being each acquainted with the description of the part sold contained in said deed of June 15th, 1859, but the division line being unascertained, by their mutual act, both parties being present at the time of division, employed said T. S. Robson to run the division line, and that the division line so run was then and there recognized and adopted as the correct line; that the said Robson very soon thereafter and during said year 1859 furnished the said company with a plat of the Huddleston lands as thus divided, a copy of which is filed with the depo-
475 sition of said Robson taken in this cause; that in the year 1861 the said Robson ran off for said company the lands owned by them and furnished said company with an inclusive plot thereof, in which the said company's portion of said Huddleston tract is laid down as it was surveyed and platted by said Robson in the year 1859, and that said company and the said Halstead claiming under it have ever since said year 1859 acquiesced in said division and never made any objection thereto until about the time this suit was brought; that the reason why said company's portion of said tract was laid off in the form in which it was laid off was because the said company wished to obtain as large a frontage on the Kanawha river as possible in order to obtain room for the erection of their buildings, and that the company did not wish to connect their portion of the said Huddleston tract with their other lands on the east because they had no thought at

that time of taking out their coal from the Forest Hill 2,000-acre tract over the Huddleston tract, but expected to do so over the Elk Ridge tract of 5,000 acres, and hence contracted with re-
476 spondent for a right of way over said 5,000-acre tract, as may be seen by the deed aforesaid, and, moreover, they thought that the portion of the Huddleston tract assigned to them as aforesaid connected with their 2,000 acres on the south, as may be seen by reference to the Saulsbury map, according to which they claim to have purchased.

And this respondent denies all the allegations contained in said bill concerning the division of said Huddleston line not in accord with what is herein stated.

This respondent denies that said company or said Halstead ever took possession or had any portion of said Huddleston tract except what was laid off to and by them as aforesaid. He denies any misdirection of said Surveyor Robson by himself or by said Smith; he denies that said company ever repudiated said survey; he denies that the complainant never saw said map of said Robson until the year 1867, but says that it was placed in the hands of his agent, Dr. Hale, years before; he denies that he did not claim the strip between the part laid off to said company and the east line of said tract until the year
477 1883, but, on the contrary, says he always claimed it down to the time its sale was decreed in the two suits aforesaid. He denies that Com'r John W. Harris sold only the undivided half of the Huddleston tract, but he says that said com'r sold the entire residue of said tract remaining after the division made of said tract in 1859, including a part of the Brannon tract, and that said $9\frac{74}{160}$ acres was not sold as a part of said Huddleston tract, and that said com'r never "reported the said sale to the court for confirmation as a sale of one undivided half of the Huddleston tract," and that the action of said com'r in selling the whole of said remaining portion of said Huddleston tract reported to contain $154\frac{1}{8}$ acres and in authorizing a quitclaim to said $9\frac{74}{160}$ acres was fully approved and ratified and confirmed by decree of the said circuit court of Greenbrier rendered in said causes of Grinnan *vs.* Long *et al.* and Chewning *vs.* Cowan *et al.*

This respondent, further answering, denies that he in any manner misled the complainant or misstated the object and purpose of the said suits of Grinnan *vs.* Long *et al.* and Chewning *vs.* Cowan
478 *et al.* He denies that the effect of any proceedings had or taken in said suits on the petition of said Halsted was to set aside the said decrees of sale and confirmation. He denies that said suits were removed from the county of Fayette to the county of Greenbrier "for the purpose of putting them where your orator (the complainant) would not be likely to know that your orator's lands were involved therein," but says that the same were so removed for the convenience of court, counsel, and parties, the judge of the said court residing in said county of Greenbrier, where more time is given under the arrangement of his courts for the consideration of chancery causes than elsewhere, the commissioner who took the elaborate

accounts ordered in the case and some of the counsel residing there, and the county-seat of that county being far more accessible than Fayette court-house to all the parties and their counsel, none of whom resided in said county of Fayette.

And, having fully answered, respondent prays hence to be dismissed with his costs.

A. G. GRINNAN,
Per Counsel.

HARRIS, *Sol.*

479 STATE OF WEST VIRGINIA, } *To wit:*
Kanawha County, }

John W. Harris, being duly sworn, says that he is the attorney of the defendant named in the foregoing answer, and that he knows the contents thereof; that the facts and allegations therein contained are true except such as are therein stated upon information and belief, and that as to such allegations he believes them to be true.

JOHN W. HARRIS, *Attorney.*

Sworn to and subscribed before me this 25th day of November, 1887.

JAMES F. BROUN,
Notary Public in & for Ka. County, W. Va.

480 And at another day, to wit, at a district court of the United States for the district of West Virginia continued and held at Charleston, in said district, on Friday, the 25th day of May, 1888.

A. G. GRINNAN
vs.
S. C. LONG and Others
and
F. B. CHEWNING
vs.
J. F. COWAN *et als.*
} In Chancery. Consolidated.

This day Wm. Wyant filed his answer to the rule awarded against him in these causes at the last term of this court, which answer is ordered to be filed, and John Halstead replies generally thereto.

481 The answer referred to in the foregoing order is in the words and figures following, to wit:

A. G. GRINNAN
v.
S. C. LONG and Others
and
F. B. CHEWNING
vs.
J. F. COWAN *et als.*
} In Ch'y. Consolidated.

Wm. Wyant, for answer to the *the* rule awarded against him in these causes, says that he claims good and indefeasible title to lands purchased by him under the decrees in said causes and asks that his answer to the rule heretofore awarded against him in these causes and his answers to the bill and amended bill in the cause of John Halstead *v.* this respondent and others ordered to be heard with these causes be taken and read as his answer to this rule.

WM. WYANT, *By Counsel.*

J. F. BROUN,
L. G. GAINES, *Sols.*

Affidavit Waived.

Affidavit to the foregoing answer waived.

A. BURLEW,
Att'y for John Halsted.

482 And at another day, to wit, at a district court of the United States for the district of West Virginia continued and held at Charleston, in said district, on Friday, the 18th day of May, A. D. 1888.

JOHN HALSTEAD
vs.
A. G. GRINNAN and Others.
} In Equity.

and

A. G. GRINNAN
vs.
S. C. LONG and Others.
} In Equity.

and

F. B. CHEWNING
vs.
J. F. COWAN.
} In Equity.

The parties to these causes, by their attorneys, waive all formal objections to the depositions of the witnesses taken and filed in these causes, in the taking and certifying of the same, and also any objections to which said depositions may be subject in consequence of the fact that said depositions may not have been taken in accordance with the rules of the Supreme Court; and the plaintiff, Halstead, waives all objection to the reading in evidence of the copies

of the plat and survey and the letter filed with the answer
483 of A. G. Grinnan, dated August 9th, 1859, because they are copies, and the said copies upon the hearing are to have the same force and effect as if they were originals.

And it is agreed that the depositions of John Halstead and Charles F. Hale taken in the first-mentioned cause may be read as evidence on the hearing of these causes as if said depositions had been taken in all of said causes, and then this agreement shall be entered of record.

(Signed) A. BURLEW,
Att'y for John Halstead.

(Signed) MOLLOHAN & JACKSON,
Counsel for Defendants.

(Signed) BROUN & GAINES,
Counsel for Wm. Wyant.

484 And at another day, to wit, at a district court of the United States for the district of West Virginia continued and held at Charleston, in said district, on Saturday, the 26th day of May, 1885.

JOHN HALSTEAD *v.* WM. WYANT and Others.	In Equity.	Heard Together.
A. G. GRINNAN *v.* S. C. LONG and Others.	In Equity.	
CHEWNING *v.* J. F. COWAN and Others.	In Equity.	

These causes this day came on to be heard together and were argued by counsel; whereupon, upon consideration hereof, it is adjudged, ordered, and decreed that the bill and amended and supplemental bill in the first above-mentioned cause be, and the same *is* hereby, dismissed, and that the defendants therein recover of the complainant, John Halstead, their costs about their defence in that behalf expended.

485 And it is further adjudged, ordered, and decreed that the petition for rehearing filed by said Halstead in said second and third suits above mentioned and the rule awarded said Halstead in said suits against the defendant William Wyant be each of them, and the same are hereby, dismissed; and it is further adjudged, ordered, and decreed that the defendants in said petition and said rule respectively recover their costs against said Halstead; but in taxing the costs recovered in this decree but one attorney's fee shall be allowed.

486 And at said day, to wit, at a district court of the United States for the district of West Virginia continued and held at Charleston, in said district, on Saturday, the 26th day of May, 1888.

JOHN HALSTED
vs.
A. G. GRINNAN *et al.*

CHEWNING *et al.*
vs.
COWAN *et al.*

and

GRINNAN
vs.
LONG *et al.*

} In Chancery.

This day John Halsted presented his petition in the above causes for a rehearing of the same and also for the purpose of setting aside that part of that certain order made therein on the 18th day of May, 1888, as prayed for in said petition, and said petition is ordered to be filed; and thereupon the defendants, William Wyant & A. G. Grinnan, moved the court to dismiss the said petition.

487 The petition of John Halsted, referred to in the foregoing order, is in the words and figures following, to wit:

JOHN HALSTEAD
vs.
A. G. GRINNAN *et al.*
} In Chancery.

CHEWNING *et al.*
vs.
COWAN *et al.*
} In Chancery.

and

GRINNAN
vs.
LONG *et al.*
} In Chancery.

To the Honorable John J. Jackson, judge of the district court of the United States for the district of West Virginia, holden at Charleston:

Your petitioner, John Halstead, complainant in the first-mentioned of the above causes, says that part of the order made in the above causes on the 18th day of May, 1888 (during the present term of your honor's court), which decides that the copy of the letter filed with the answer of A. G. Grinnan in the first-mentioned cause,
purporting to be a copy of a letter written by John McKinney,
488 and the copy of the plat filed with same answer, purporting to be a copy of a plat made by T. S. Robson, shall have the same force and effect as if they were original papers was made on the statement of counsel for the defendants in said cause; that they were true copies of the original papers which they purported to represent, and your petitioner, believing the statements so made were

entirely correct, consented that said order should be entered; that since the entry of said order, and, in fact, since the said cause has been heard on its merits, your petitioner (through his counsel) has had an opportunity of examining some original papers (in the hands of his counsel), and he finds that the said plat or map, so far as it omits to state the time the original map was made and in so far as it represents certain parties as being present when said map or plat was made, is not correct, & is therefore not a true copy of the map it purports to represent. Your petitioner herewith files the original plat and survey made by T. S. Robson of the land in controversy, in 1859, marked "Ex. B," which was furnished by said Robson to the Forest Hill Co. shortly after it was made, and it shows that Hale and Eames are right in regard to the time Robson made the survey of the land, in 1859. It also shows that neither Hale, Eames,
489 or McKinney are mentioned by said Robson in his notes of survey. Your petitioner therefore prays that so much of the said order as gives the said pretended copies the force of original papers be set aside and held for naught on the ground that it was entered under a misapprehension of facts.

Your petitioner says also that he has been taken by surprise, on the hearing of the above causes, by the interpretation given by the court of that part of the deed from A. G. Grinnan and others to the Forest Hill Mining and Manufacturing Company, dated the 15th day of June, 1859. Your petitioner believes that if a rehearing of the said causes be granted he will be able to show to the satisfaction of the court that he is entitled to the relief prayed for in his bill. Your petitioner therefore prays that the said causes be reheard upon their merits as if no hearing had been had; that the decree directed to be entered this day be recalled, and that your honor will grant such relief, on the further hearing of said causes, as
490 justice and equity demand; and your orator will ever pray, &c.

JOHN HALSTED,
By A. BURLEW.

A. Burlew, relator and attorney for John Halsted, whose name is signed to the writing above, being duly sworn, says he is cognizant of the matters stated in the above petition and believes them to be true.

A. BURLEW.

Sworn to before me this 26 May, 1888.

JASPER Y. MOORE,
Clerk D. C. U. S., D. W. Va.

NOTE.—The map ("Exhibit B") referred to in the foregoing petition was filed by the order next hereinafter set forth, and a copy thereof is hereinafter inserted.

L. B. DELLICKER, *Clk.*

491 And at another day, to wit, at a district court of the United States for the district of West Virginia continued and held at Charleston, in said district, on Friday, the 6th day of July, 1888.

JOHN HALSTED
vs.
A. GRINNAN and Others.

A. G. GRINNAN
vs.
S. C. LONG & Others. } In Chancery.

and

CHEWNING
vs.
COWAN & Others.

This day A. Burlew tendered to the court in support of the petition for rehearing (filed in the above causes) his affidavit and also the original map of T. S. Robson, surveyor of Fayette county, bearing date the 14th day of October, 1859, and endorsed as "Exhibit B," and upon his motion they are ordered to be filed, to be read on the hearing of the said petition.

492 The affidavit of A. Burlew, referred to in the foregoing order, is in the words and figures following, to wit:

A. Burlew, after being duly sworn, makes oath and says that he was and is the original and only solicitor and attorney for John Halsted in his suit in equity against A. G. Grinnan and others, and also for him in the suit of A. G. Grinnan against him and others, pending in the district court of the United States for the district of West Virginia, at Charleston; that when said causes were called for trial, during the term of said court which has just closed, affiant announced himself ready for trial, and the counsel for the others parties to said causes, viz., Messrs. Miller, Broun & Mollohan, through the latter stated that exceptions had been taken to the reading of certain depositions, and that they wanted the said exceptions disposed off before they could say whether they were ready or not; that thereupon affiant agreed upon an order, which was entered, which disposed of the question of exceptions to depositions; that the said counsel then (Mollohan) stated to the court that copies of a certain map or plat and letter had been filed with the answer of A. J. Grinnan to the bill of John Halsted filed by him in his suit above mentioned; that the originals of said papers were in the hands of A. G. Grinnan, who lived in Virginia, and that they could not go to trial of said causes at that term unless affiant would admit that they were true copies of original papers in the hands of A. G. Grinnan and should be given the same effect on the trial of said causes as the original papers would have if they were filed with said answer; that affiant objected to making such admis-

493

sion and stated to the court that if A. G. Grinnan had any such original papers as represented by the said counsel he could file them in the cause, subject to such exceptions as might be made to them, but that he was not willing to admit a matter that he knew nothing about. The said counsel then again stated to the court that there was no doubt that the said papers were true copies of original papers in the hands of A. G. Grinnan, and that unless affiant would
494 admit the said papers as original papers he would ask the court to grant them leave to take the deposition of A. G. Grinnan concerning them, and that they could not go to trial of said causes without such admission or the said original papers.

Thereupon the court made a suggestion that unless affiant had some reason to believe that the papers referred to were not true copies of original papers why not admit the said copies as original papers and submit the causes. Upon this statement of counsel and suggestion by the court, and believing that said counsel would not intentionally make an untrue statement about the matter, affiant consented to the order being made, in effect admitting said papers to have the force and effect of original papers on the trial of said causes. Affiant says that during the discussion of the questions referred to the said files were not before the court, and affiant then had no opportunity to examine them, and it had been some six months since he had examined said files; that affiant had at one time glanced over the said copy of map or plat, so
495 called, sufficient to see that the general features of said plat or map corresponded with the original map and survey made by T. S. Robson, surveyor of the land in question, in 1859, which he had furnished to the Forest Hill Mining & Manufacturing Company, but affiant had never examined and compared the notes or memoranda on the said pretended copy with the original notes made by said Robson on the said original map to see whether they compared or not, nor had affiant ever read the pretended copy of letter filed with the answer of said Grinnan, for the reason that the said paper is very illegible to affiant, and affiant knew that with a general replication which had been made to said answer the said papers could not be considered as evidence in said causes, and affiant's attention had never been called to either of said papers during the taking of all the depositions in said causes or to a single date or memorandum thereon by any one, and affiant did not believe that A. G. Grinnan would be guilty of filing a false paper in said cause, and he had so much confidence in the merits
496 and moral of his cause that no genuine paper could be filed by anybody that could seriously affect his client; that he gave his consent reluctantly that an order might be entered giving said papers the force of originals. The above statement is all the knowledge affiant had of the contents of said papers until Mr. Mollohan referred to them particularly in his argument of the cause, calling the attention of the court to the fact that the copy of the map referred to filed with the answer of Grinnan contains a statement made by the surveyor, T. S. Robson, at the time he made the said survey that the survey was made " under the directions of J. M. Mc-

Kenney, Dr. Hale, and Mr. Eames," and that the copy of the letter referred to showed that Hale and Eames were present when the survey was made, and that it was made in August, 1859, at a time when both Hale and Eames were at Forest Hill, instead of October, 1859, when Hale and Eames say the survey was made, when Dr. Hale was in New York, and Mr. Mollohan urged that these two papers showed that Hale and Eames were mistaken when
497 they stated in their depositions that he, Dr. Hale, was in New York when Robson made the said survey. The charge made by Mr. Mollohan of the contents of these papers took affiant entirely by surprise, and he could say nothing in reply at the time except that if the said papers contained any such statements as those asserted by Mr. Mollohan they were in direct opposition to the sworn statements made by Hale and Eames in their depositions taken in this cause concerning the same matter, and in fact in opposition to all the evidence taken in these causes on the subject except the deposition of Grinnan, given at a time when there was no one to cross-examine him, in which he admits that he was not present, & therefore had no personal means of knowing who was present. Affiant believes that the so-called copies of letter and map had a material influence with the court in coming to the decision it did in deciding the said causes; that affiant, after a night's reflection, recollected that he had had the original map and survey in his possession made by
498 T. S. Robson of the land involved in said causes in 1859, and that he might then have said original map. This induced affiant to make search for it the next day when he found it in his office, and an examination of it disclosed the fact that said original map did not contain any reference to its being made under the direction of McKenney, Hale, and Eames, or either of them, nor is either of said names on said original map at all; and the date of said original map fixed thereon in the handwriting of T. S. Robson, surveyor, shows that Hale and Eames were correct in the statements made by them in their depositions as to the time when said survey was made by T. S. Robson, & therefore that Dr. Hale was not present when the same was made, but was in New York; that this original survey, in connection with the depositions of Hale and Eames, shows, as affiant believes, that the omission of the date of making said survey from the said pretended copy is an intentional
499 fraud on the part of A. G. Grinnan for the purpose of making it correspond with the said copy of letter pretended to have been written by John M. McKinney to said Grinnan on the — day of August, 1859, so as to make it appear that said survey was made by Robson in August, 1859, or before, when Hale was at Forest Hill, instead of Oct. —, 1859, as claimed by Hale, Eames, and Halsted when Hale was in New York; that the words on said pretended copy of map filed by Grinnan, to wit, "Forest Hill frontage, as surveyed by Thos. S. Robson, under directions of J. M. McKenney, Dr. Hale, & Mr. Eames," are attempted to be palmed off by said Grinnan on the court as part of the original notes or memoranda made by T. S. Robson at the time he made said survey, when in fact no

502 And at another day, to wit, at a district court of the United States for the district of West Virginia continued and held at Charleston, in said district, on Saturday, the 8th day of December, 1888.

JOHN HALSTED
vs.
A. G. GRINAN & Others. } In Chancery.

The defendants having stated to the court that they have the affidavits of A. G. Grinan and T. S. Robson, which they desire to use on the rehearing of this cause on the petition of the complainant heretofore filed, it is ordered that said defendant do file said affidavits within thirty days; otherwise the said affidavits will not be considered by this court on the hearing of said petition.

NOTE.—I do not find the affidavit of Robson referred to in the foregoing order among the papers on file in my office.

L. B. DELLICKER, *Cl'k.*

503 The affidavit of A. G. Grinnan, filed Jan'y 4, 1889, & referred to in the foregoing order, is in the words and figures following, to wit:

STATE OF VIRGINIA, } *To wit:*
Orange County, }

I, A. G. Grinnan, on oath say that I am the same A. G. Grinnan who is a defendant to a suit in equity pending in the district court of the United States for the district of West Virginia, at Charleston, wherein John Halstead is complainant and myself and others are defendants.

That I filed my answer in said cause and filed therewith a copy of a letter received by me in due course of mail soon after its date from one J. M. McKinney, said letter bearing date August the 4th, 1859; that said letter remained in my possession from its receipt until forwarded to my counsel, W. Mollohan, residing in the city of Charleston, Kanawha county, West Virginia, on or about the — day of May, 1888, and that said original letter has been returned by him to me and is hereto attached as a part of this affidavit,
504 marked Exhibit A with affidavit of A. G. Grinnan; that said letter so dated and attached to this affidavit is the identical letter so received by me from the said McKinney as aforesaid.

I further state on oath that with said letter so received by me from said McKinney there was enclosed to me a plat of the division of what is known in this suit as the Huddleston land, situated a short distance below Armstrong creek, on the south side of Kanawha river, in Fayette county, West Virginia, together with certain courses and distances written thereon of the portion of the said tract assigned to the Forest Hill Company, also a statement as to the surveyor by whom said division had been made and the parties under whose direction it had been made; that said plat, together with the

writing thereon as aforesaid, remained in my possession until I prepared my answer in said cause, and at the time of the preparation of my said answer I made and attached to said answer an ex-
505 act copy of the said plat and the written statement and courses and distances as written upon said plat, omitting nothing that appeared thereon and adding nothing that did not appear thereon; that since the preparation of my said answer, at the instance of my counsel, I have made diligent search for the said original plat so inclosed to me by said McKinney, but have been unable to find the same and believe that the same has either been mislaid, lost, or destroyed.

I further state that I have not introduced or attempted to introduce in evidence in said cause any spurious or bogus documents or any untrue or false statements in regard to the matters in controversy in said cause, and that some years ago in New York city the complainant, John Halsted, exhibited to me an original duplicate plat made by Thos. Robson, surveyor, identical with this, a copy of which I filed with my said answer.

A. G. GRINNAN.

I, John G. Williams, a notary public for the county of Orange and State of Virginia aforesaid, do hereby certify that A. G.
506 Grinnan, well known to me, personally appeared before me in said county on the day hereinafter mentioned and subscribed his name to the foregoing affidavit in my presence and made oath to the truth of the statements therein contained, and that the letter attached to the said affidavit dated August the 4th, 1859, and signed J. M. McKinney, was attached to said affidavit at the time the same was so sworn to by said Grinnan, and that I have marked the said letter with my initials.

Given under my hand and notarial seal this the 24th day of November, 1888.

JOHN G. WILLIAMS,
[SEAL.] *Notary Public.*

Letter with Affidavit of A. G. Grinnan Marked Exhibit "A," A. G. G., J. G. W.

19 NASSAU ST., NEW YORK, *Aug. 4th*, 1859.

Dr. A. G. Grinnan.

507 DEAR SIR: I should have written you before in regard to my trip to the Kanawha, but waited for the return of Capt. Smith, who was absent from the city when I got back, and I understood from him that you would probably soon be in New York. Owing to the many delays I experienced after leaving Parkersburg I was just one week in reaching Huddleston's. I awaited there the arrival of Dr. Hale & Mr. Eames, and then proceeded to have a survey made of the "Huddleston tract," and had one hundred acres set off (as near as possible) for the Forest Hill Co., subject to the approval of Smith & yourself. I enclose you the plot of the survey as made by Mr. Robson, the county surveyor. On my way from

Charleston to Huddleston's I met Mr. Patton and learned from him that the papers from the clerk's office of Fayette Co. had been forwarded to you some time before, and since my return I have been informed that you received them about the time I left New York.

I regret that I did not know of the fact of your receiving them,
508 as it would have saved you the expense of the trip and myself from an unexpected absence from home of three weeks. I think, though, that it was of great importance to all parties that the survey & division of the Huddleston tract should have been made at once. It enabled the parties to commence operations at once, exploring their coal beds and breaking ground for their works. I endeavored to subserve your interests as far as lay in my power. I have been informed within a day or two that Messrs. Hale & Eames have discovered a very valuable vien of cannel coal on their property, and that they were progressing rapidly with their preparations for erecting their works. If I can be of service to you in any way here I shall be glad to do so.

Yours truly, J. M. McKINNEY.

I enclose Mr. Robson's bill for surveying. I paid him six dollars, which he has credited, leaving a balance of $12.57, which he requests to be remitted to him in Virginia bills or check on Virginia bank at Charleston. He had not finished the work when I left, & has since forwarded plat, &c., by mail.

509 Paper marked Exhibit B with affidavit of A. G. Grinnan and endorsed "(Copy) courses & distances and statements written upon plat of Huddleston or Forest Hill Co. land."

"Forest Hill frontage as surveyed by Thos. S. Robson under direction of J. M. McKinney & Dr. Hale & Mr. Eames.

Begin at a large sycamore on bank of Kanawha river, at head of Withers island, thence south 53¼° west 460 poles to two pines on a ridge in a line of original survey; thence with said line south 33° E. ten poles to a stake on said line; thence north 55¼ east 126 poles to a lynn, maple, dogwood, & ironwood on north hillside; thence north 80° east 84 poles to a pine, gum, & chestnut on point of a ridge; thence north 60° east 244 poles to a beach on the bank of the river; thence north 35° west 70 poles down & with river to the beginning, containing about 105 acres."

Here follows copy of the plat showing the division according to the above courses and distances.

510 And at another day, to wit, at a circuit court of the United States in and for the district of West Virginia held at Charleston on Tuesday, the 21st day of May, A. D. 1889.

In pursuance of section 4 of the act of Congress entitled An act to abolish circuit court powers of certain district courts of the United States and to provide for writs of error in capital cases and for other purposes—

It is ordered that all suits in equity and all other causes which by force of the said act of Congress should belong to the circuit court, and all the proceedings, matters, records, files, and papers pertaining thereto, be transferred from the district court of the United States for the district of West Virginia into this court, and such suits and causes shall thereafter be proceeded in as if originally brought in this court.

This decree is now entered as of the second day of May, A. D. 1889, and is entered *nunc pro tunc.*

511 And at another day, to wit, at a circuit court of the United States for the district of West Virginia continued and held at Charleston, in said district, on Monday, the 27th day of May, 1889.

JOHN HALSTED
vs.
WILLIAM WYANT & Others.

and

A. G. GRINNAN
vs.
S. C. LONG & Others.

and

F. B. CHEWNING
vs.
J. S. COWAN & Others.

} In Chancery.

These causes came on this day to be further heard upon the petition filed by John Halsted to rehear the decree entered in said causes on the 26th day of May, 1888, and upon the affidavit of A. G. Grinnan and the exhibits attached thereto, filed in the clerk's office of the court on the 4th day of January, 1889, and upon the affidavit of A. Burlew, heretofore filed, and the affidavits of John Halsted, R. M. Evans, Henry H. Eames, and exhibits accom-
512 panying the same now ordered to be filed.

And thereupon, upon consideration thereof, it is ordered, adjudged, and decreed that the said motion be refused and the said petition to rehear said causes be dismissed, and that the defendants recover of the said Halstead their costs about their defence of said motion expended, but no attorney's fee is allowed in this order.

And thereupon John Halstead, by his attorney, tendered his petition in said causes of A. G. Grinnan against S. C. Long and others and F. B. Chewning against J. F. Cowan and others, praying that the fund that may hereafter come into the hands of John W. Harris, commissioner, or that may be now due from said William Wyant arising from the sale of the lands by said Harris, commissioner, to William Wyant, as set out in said petition, be required to be paid into the registry of the court, and that said parties be restrained

and enjoined from disposing of said monies, which is ordered to be filed; and the said John W. Harris, com'r, and William
513 Wyant are each respectively enjoined, restrained, and inhibited from disposing of said monies or any part thereof, and when said monies are collected by said commissioner from said Wyant he is hereby ordered and directed to pay the same into the registry of this court.

NOTE.—The petition of John Halsted, referred to in the last part of the order last above set forth, together with the order entered in said causes on the 28th day of May, 1889, are omitted from the record by order of A. Burlew, Esq., counsel for John Halsted.

L. B. DELLICKER, *Clerk.*

514 The affidavit of John Halstead referred to in the order last above set forth is in the words and figures following, to wit:

STATE OF PENNSYLVANIA, }
Borough of Mauch Chunk, Carbon County. }

John Halstead, being duly sworn, deposes and says that he is the plaintiff in the suit against A. G. Grinnan & others, in chancery, pending in the United States circuit court at Charleston, West Virginia.

That the original map & notes of survey made by T. S. Robson, surveyor of the Huddleston tract of land, which is filed in said cause as part of the deposition of Charles F. Hale, is the only original paper this affiant ever saw of a survey made by said Robson in laying off said tract between the Forest Hill Mining & Manufacturing Co. and A. G. Grinnan in 1859. A true and exact copy of said original map & notes is herewith filed, endorsed Exhibit "A." The original is filed with the deposition of Charles F. Hale.

That the paper herewith filed purporting to be a copy of the paper filed with the answer of A. G. Grinnan in said cause, endorsed
515 "Copy of paper filed with answer of A. G. Grinnan in suit of Halstead against him in United States circuit court, West Virginia," is not a correct copy of the said original map and notes made by T. S. Robson, surveyor, filed with the said deposition of Charles F. Hale, as can be plainly seen.

I understand that A. G. Grinnan has stated in a late affidavit filed by him in said cause as follows: "That some years ago in New York city the complainant, John Halstead, exhibited to me an original duplicate plat made by T. S. Robson, surveyor, identical with that, a copy of which I filed with my said answer." This statement is positively untrue. The only map & notes made by T. S. Robson in regard to the laying off of the Huddleston tract in 1859 are those embraced in the said original paper filed with the said deposition of Charles F. Hale. Affiant further says that he has no recollection of showing to A. G. Grinnan any paper relating to the survey of 1859, but if he did, it must have been the map now filed with the deposition of Charles F. Hale—it is the only one he has ever seen—

nor has affiant any knowledge whatever of such a plat as has been sworn to by A. G. Grinnan in this cause.

516 Affiant is under the impression Charles F. Hale left Forest Hill in the early part of September, 1859, to visit his family, who resided in New York, his wife being then very ill of a complaint that caused her death, and after he returned to Forest Hill, some time in November, he sent to L. A. Rosenmiller a plat of the front or Huddleston tract, saying he had just received it.

Affiant says the delay in running the dividing lines of the Huddleston tract did not interfere with the company's plan in locating their works, for the reason that the contour of the ground made it necessary to locate their buildings some distance west of what they knew would be the dividing line of the tract when the line was run, but he has no knowledge when the survey was made except as to the date written on the plat, October 14th, 1859.

JOHN HALSTEAD.

Sworn and subscribed before me, a notary public, residing at Mauch Chunk and in and for the county and State aforesaid, the affiant being well known to me and personally appearing on this second day of April, A. D. 1889. [NOTARIAL SEAL.]

L. H. BARBER,
Notary Public.

517 EXHIBIT A REFERRED TO IN FOREGOING AFFIDAVIT.

(See diagram marked p. 517.)

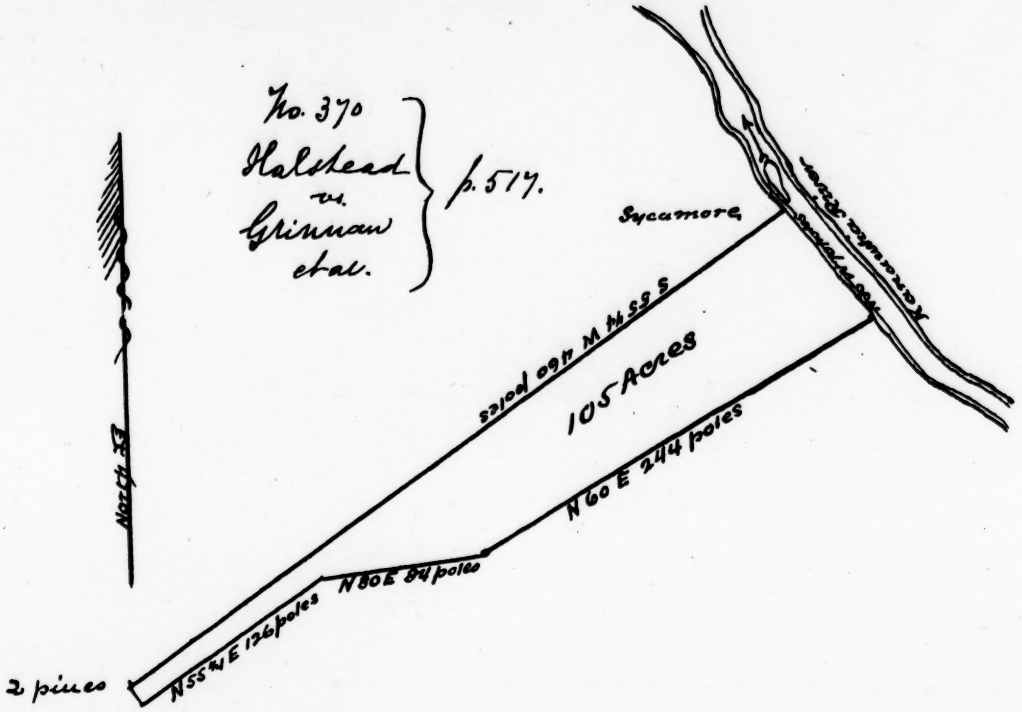
Plat of the Land — the Forest Hill Coal & Mining Company Bought of Geo. P. Huddleston.

Beginning at a large sycamore on the bank of the Great Kanawha river at the head of Wheeler's island & running 55¼ W. 460 poles to 2 pines on a ridge on a line of the original survey; thence with said line S. 33° E. 10 poles to a stake on said line; thence N. 55¼ E. 126 poles to a lynn, maple, dogwood, & ironwood on a north hillside; thence N. 80 E. 84 poles to a pine, gum, & chestnut on the point of a ridge; thence N. 60 E. 244 poles to a beech on the bank of a river, & thence N. 35 W. 70 poles down & with the river to the beginning, containing 105 acres.

T. S. ROBSON, *S. F. C.*

Fee, 50 cents. Oct. 14th, 1859.

518 (Endorsed:) Exhibit "B" filed with the deposition of Charles F. Hale before me, in the chancery cause of Halsted *vs.* Grinnan & others, in the U. S. district court on April 25th, 1887. Copy made & marked as this. L. E. McWhorter, notary public.


No. 370
Halstead
vs.
Grinnan
et al.
p. 517.
Sycamore
Kanawha River
S 55¾ W 460 poles
105 Acres
N 60 E 244 poles
N 80 E 84 poles
N 55¾ E 126 poles
2 pines
North

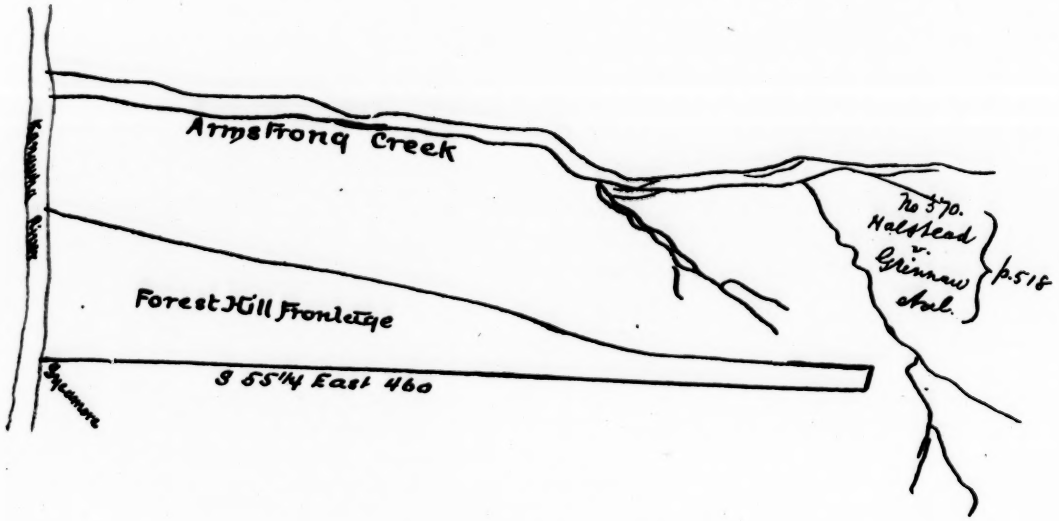

Armstrong Creek
Forest Hill Frontage
S 55¼ East 460
No 370.
Halstead
v.
Grinnaw
Atal.
p.518

EXHIBIT B REFERRED TO IN FOREGOING AFFIDAVIT.

Forest Hill frontage, as surveyed by Thos. Robson under directions of I. M. McKinney & Dr. Hale & Mr. Eames, begins at a large sycamore on bank of Kanawha river at head of Wheeler's island; thence south 55¼° west 460 poles to 2 pines on a ridge in a line of original survey; thence with said line south 33° east 10 poles to a stake on said line: thence north 55¼ east 126 poles to a lynn, maple, & dogwood & ironwood on north hillside; thence north 80 east 84 poles to a pine, gum, & chestnut on point of a ridge; thence north 60 E. 244 poles to a beech on the bank of the river; thence north 35° west 70 poles down & with river to the beginning, containing about 105 acres.

(See diagram marked p. 518.)

(Endorsed:) Copy of paper filed with answer of A. G. Grinnan in suit of Halsted against him. U. S. D. c't W. Va.

519 The affidavit of Henry H. Eames referred to in the order last above set forth is in the words and figures following, to wit:

Henry H. Eames, State of Maryland, county of Baltimore, after being duly sworn by the undersigned, says:

I was connected with the Forest Hill Mining and Manufacturing Company as chemist from some time in June, 1859, until the company stopped work, in 1861.

During part of said time—that is, during part of 1860 and 1861—I lived on the portion of the said company's land lying on the Kanawha river, in Fayette county, Virginia, now West Virginia.

Dr. C. F. Hale was the first and only president of the company and had general charge of all the company's operations. My brother, R. M. Eames, was also connected with the company during the period above mentioned.

I have a distinct recollection of *of* J. S. Robson, surveyor, laying off to the Forest Hill Company that part of what is known as the "Huddleston tract," purchased by said company from Messrs. Smith and Grinnan, lying next to the Kanawha river. My brother and I were at Forest Hill at the time, and, as the Forest Hill Company were about erecting several buildings for the purpose of develop-

520 ing the company's property, we were anxious to know where the dividing line would run from the river back to the hills, in which portion the company had decided to locate their buildings. Both I and my brother took an interest in this survey made by said Robson to this extent, but took no further interest in it at that time, as we were otherwise engaged. My brother and I were the only representatives of the company at Forest Hill at the time this survey was made, and that neither of us accompanied the surveyor in laying off said land further than I have above stated. This survey was made by said Robson in Oct., 1859, and I am

sure of this from the fact that it was subsequent to the birth of my eldest son, who was born September 29th, 1859, and from the fact that the president, C. F. Hale, was absent in New York, and that Robson gave me the plat in the absence of C. F. Hale; that neither John Halstead nor the president of the company, C. F. Hale, were present when the survey was made; they were both in New York. John Halstead did not come to Forest Hill until some time after the survey was made by Robson in 1859.

Dr. C. F. Hale had been at Forest Hill from the month of
521 July, 1859, until about the middle of September, 1859, when he received a letter informing him of the serious illness of his wife. He left immediately for New York. I am very certain of this, for the reason I was most anxious he should remain on account of my family, but the letter he received was of such a character that I advised him (C. F. Hale) to go at once, which he did, and did not return to Forest Hill for two or three months. It was during this time that Robson made the survey above referred to—some time during October, 1859. I am certain of this from the fact that I remained at home with my family for some days during the early part of Oct. and was present when the lines were run from the river to the hills, and, moreover, J. S. Robson gave me the plat, of which the accompanying one is a true and correct copy of the original that I handed Dr. C. F. Hale on his return to Forest Hill. I do not remember the exact date of the death of Mrs. Hale, but am under the impression it was very shortly after the arrival of Dr. C. F. Hale in New York.

Neither I or any one else then at Forest Hill had any au-
522 thority to accept or reject any line run by J. S. Robson, I supposing he simply did as ordered by Messrs. Smith and Grinnan, according to their agreement with the Forest Hill Company.

HENRY H. EAMES.

Subscribed and sworn to before me this sixth day of April, 1889, at Baltimore city, State of Maryland.

[SEAL.] FELIX R. SULLIVAN,
Notary Public.

I herewith attach a true copy of the plat and notes of the survey made by J. S. Robson in October, 1859. The original plat and notes from which this copy is made were handed me by J. S. Robson, and I can readily recognize it from its peculiar rudder-shape form, which form had been firmly fixed in my mind, and is a true copy of the original I handed Dr. C. F. Hale on his return to Forest Hill.

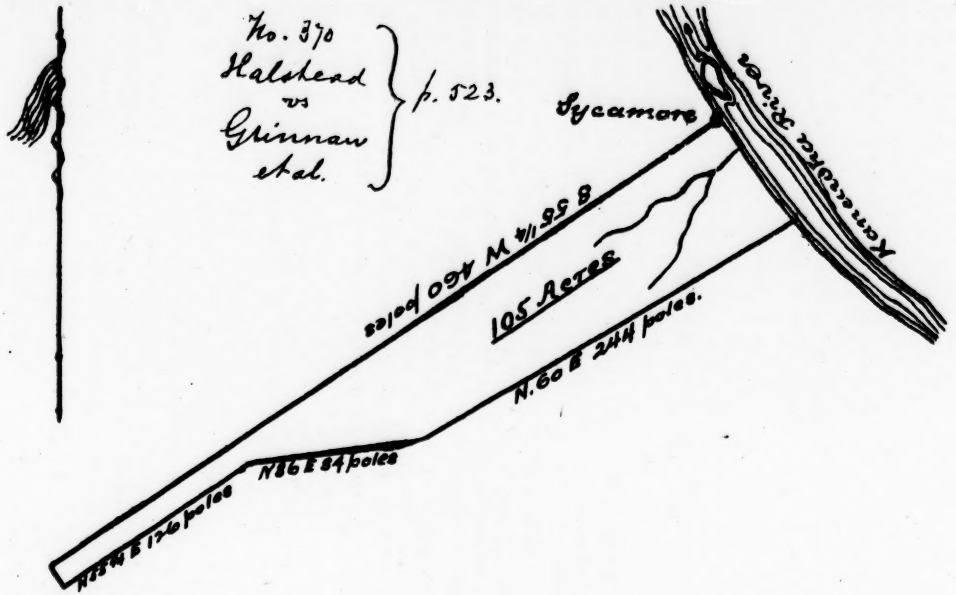
HENRY H. EAMES.

Witness:
FELIX R. SULLIVAN.
C. C. POULTNEY.

[SEAL.]

523 (Map referred to in foregoing affidavit.)

(See diagram marked page 523.)


No. 370
Halstead
vs
Grinnan
et al.
p. 523.
Sycamore
Kentucky River
S 55 1/4 W 400 poles
105 Acres
N. 60 E 244 poles.
N 86 E 84 poles
N 25 1/4 E 126 poles

Plat of the Land — the Forest Hill Coal & Mining Company Bought of Geo. P. Huddleston.

Beginning at a large sycamore on the bank of the Great Kanawha river at the head of Wheeler's island & running S. 55¼ W. 460 poles to two pines on a ridge on a line of the original survey; thence with said line S. 33 E. 10 poles to a stake on said line; thence N. 55¼ E. 126 poles to a lynn, maple, dogwood, & ironwood on a north hillside; thence N. 80 E. 84 poles to a pine, gum, & chestnut on the point of a ridge; thence N. 60 E. 244 poles to a beech on the bank of the river, & thence N. 35 W. 70 poles down & with the river to the beginning, containing 105 acres.

T. S. ROBSON, *S. F. Co.*

Fee, 50 cents. Oct. 14th, 1859.

524 The affidavit of Richard M. Eames referred to in the order last above set forth is in the words and figures following, to wit:

Richard M. Eames, town of Salisbury and State of North Carolina, after being duly sworn by the undersigned, says:

I was connected with the Forest Hill Mining and Manufacturing Company as engineer from some time in July, 1859, until the company stopped work, in 1861. I recollect when J. S. Robson surveyed and layed off to the Forest Hill Company what was known as the Huddleston "tract." I did not accompany him when the survey was made. I was otherwise engaged with my brother, H. H. Eames, and he & myself were the only representatives of the company at Forest Hill at that time. The president, Dr. C. F. Hale, was in New York, attending to his wife, who was seriously ill at that time.

RICHARD M. EAMES.

Sworn to and subscribed before me this 22d day of April, 1889.

[SEAL.] ORIN D. DAVIS,
Notary Public.

525 *Affidavits Filed in Above Causes on the 27th Day of August, 1889, Referred to in the Order Entered on that Day.*

The affidavit of John Halstead, filed on said day, is in the words and figures following, to wit:

STATE OF PENNSYLVANIA, } *ss:*
County of Carbon, }

Personally appeared before the undersigned, in the county and State aforesaid, John Halstead, who, after being by me first duly sworn, says he is complainant in the suit of John Halstead against A. G. Grinnan & others, in chanc'y, lately pending in the United States circuit court at Charleston, in the State of West Virginia; that the matter in controversy in said suit was the partition of a

certain tract of land known as the "Huddleston" tract according to the deed from Wm. K. Smith and wife and A. G. Grinnan and wife and A. G. Grinnan, trustee, to the Forest Hill Mining and Manufacturing Company, dated the 15th day of June, 1859, and the line of partition of said tract claimed by said Grinnan to have been made by T. S. Robson, surveyor, in 1859; that the value of
526 the said property in dispute in said cause, exclusive of costs, exceeds the value of five thousand dollars; that its value consists in its own value as a coal and mineral property and as an outlet for the "Forest Hill tract" of two thousand acres of land (described in said deed) to the Great Kanawha river and the Chesapeake and Ohio railway, and said value is, in affiant's judgment, not less than twenty thousand dollars.

JOHN HALSTEAD.

Sworn and subscribed before me this 8 day of July, 1889.

L. H. BARBER,

[NOTARIAL SEAL.] *Notary Public.*

The affidavit of Henry H. Eames, filed on said day, is in the words and figures following, to wit:

STATE, COUNTY, AND CITY OF NEW YORK:

Personally appeared before the undersigned, in the city, county, and State aforesaid, Henry H. Eames, who, after being by me
527 first duly sworn, says he is acquainted with the land, its location and probable value, mentioned by the complainant in the suit of John Halstead against A. G. Grinnan and others, in chancery, lately pending in the United States circuit court at Charleston, in the State of West Virginia; that the matter in controversy in said suit was the partition of a certain tract of land known as the "Huddleston" tract according to the deeds from Wm. K. Smith and wife and A. G. Grinnan and wife and A. G. Grinnan, trustee, to the Forest Hill Mining and Manufacturing Company, dated the 15th day of June, 1859, and the line of partition of said tract claimed by said Grinnan to have been made by T. S. Robson, surveyor, 1859; that the value of the said property in dispute in said suit, exclusive of costs, exceeds the value of five thousand dollars; that its value consists in its own value as a coal and mineral property and as an outlet for the "Forest Hill tract" of two thousand acres of land (described in said deed) to the Great Kanawha river and the Chesapeake and Ohio railway, and said value
528 is, in affiant's judgment, not less than twenty thousand dollars.

HENRY H. EAMES.

New York, July 24, 1889.

Witness:

MAX F. KELLER.

Sworn to before me this 24th day of July, 1889.

MAX F. KELLAR,

[NOTARIAL SEAL.] *Notary Public, 132, N. Y. Co.*

The affidavit of R. M. Eames, filed on said day, is in the words and figures following, to wit:

STATE OF NORTH CAROLINA, }
Rowan County. }

Personally appeared before the undersigned, in the county and State aforesaid, R. M. Eames, who, after being by me first duly sworn, says he is acquainted with the land, its location and probable value, mentioned by the complainant in the suit of John Halstead against A. G. Grinnan & others, in chancery, lately pending in the United States circuit court at Charleston, in the State of West
529 Virginia.

That the matter in controversy in said suit was the partition of a certain tract of land known as the "Huddleston" tract according to the deed from Wm. K. Smith and wife and A. G. Grinnan & wife and A. G. Grinnan, trustee, to the Forest Hill Mining and Manufacturing Company, dated the 15th day of June, 1859, and the line of partition of said tract claimed by said Grinnan to have been made by T. S. Robson, surveyor, 1859.

That the value of the said property in dispute in said cause, exclusive of costs, exceeds the value of five thousand dollars; that its value consists in its own value as a coal and mineral property and as an outlet for the Forest Hill tract of two thousand acres of land (described in said deed) to the Great Kanawha river and to the Chesapeake & Ohio railway, and said value is, in affiant's judgment and belief, not less than twenty thousand dollars.

R. M. EAMES.

Sworn and subscribed before me this 6th day of July,
530 1889.

J. M. HORAH,
[SEAL.] *Clerk Superior Court, Rowan County.*

The affidavit of Wm. H. Edwards, filed on said day, is in the words and figures following, to wit:

STATE OF WEST VIRGINIA, }
Kanawha County, } *To wit:*

Wm. H. Edwards, after being by the undersigned duly sworn, says he lives at Coalburg, in Kanawha county, West Virginia, and is acquainted with the land in controversy in the suit of John Halsted against A. G. Grinnan and others for partition, lately pending in the United States circuit court at Charleston, W. Va; that in 1853 he conveyed to Wm. K. Smith 7,000 acres of land known as the "Elk Ridge tract," including what is known as the Forest Hill tract of 2,000 acres, now owned by John Halsted.

That affiant is the owner of coal lands lying in the coun-
531 ties of Kanawha and Fayette *counties*, and his interest has been to keep himself posted as to the value of such lands; that in affiant's judgment the value of the property in dispute in

the said cause above mentioned, exclusive of costs, exceeds the value of five thousand dollars. This value consists in its own value as a coal property and as an outlet to the "Forest Hill" tract of two thousand acres to the Great Kanawha river and to the Chesapeake & Ohio Railway Co.

W. H. EDWARDS.

Taken, subscribed, and sworn to before me this 17th day of August, 1889.

A. C. SHAVER,
Notary Public.

STATE OF WEST VIRGINIA, *County of Kanawha,* } *ss:*

I, J. W. Goshorn, clerk of the county court of Kanawha county, in the State of West Virginia, do hereby certify that A. C. Shaver, whose name is signed to the foregoing certificate, is now and was at the time of signing the same a notary public in and for said
532 county, in said State, duly appointed and qualified; that to all his official acts full faith and credit are due, and that his signature is genuine.

In testimony whereof I have hereunto set my hand and affixed my official seal this 11th day of October, A. D. 1889, and in the 26th year of the State.

Seal of County Court.

J. W. GOSHORN, *Clerk.*

The affidavit of John C. Montgomery, filed on said day, is in the words and figures following, to wit:

Office of J. C. Montgomery, notary public.

COAL VALLEY, W. VA., *Aug.* 13, 1889.

STATE OF WEST VIRGINIA, *Fayette County,* } *ss:*

Personally appeared before the undersigned, in the county and State aforesaid, John C. Montgomery, who, after being by the
533 undersigned duly sworn, says that he is acquainted with the land involved in the suit for partition lately pending in the United States circuit court for the district of West Virginia, at Charleston, wherein John Halstead was complainant and A. G. Grinnan and others were defendants; that in affiant's judgment the value of said real property in controversy in said cause, exclusive of costs, exceeds the value of five thousand dollars; that its value consists in its own value as a coal and mineral property and as an outlet for the "Forest Hill tract" of two thousand acres of land to the Great Kanawha river and to the Chesapeake and Ohio Railway Co.; that the value of said land in dispute in said cause, in affiant's judgment, greatly exceeds the value of five thousand dollars.

Affiant says he lives at Coal Valley, in the county of Fayette, and

is one of the distributees of the late James Montgomery, dec'd, who died seized and possessed of that portion of Fayette county
534 upon which the town of Coal Valley is situated and other coal lands lying near the said "Forest Hill tract," a considerable portion of which lands belonging to the said estate of my father has been operated as coal property for many years.

JOHN C. MONTGOMERY.

Taken, subscribed to, and sworn to before me this 13th day of August, 1889.

C. ADKINS,
Justice of the — of Fayette County, W. Va.

(Endorsed:) Mr. Montgomery owns land- right near the Forest Hill tract & has *has* had them operated as coal lands ever since the coal business sta-ted in Fayette Co.

The affidavit of M. T. Davis, filed on said day, is in the words and figures following, to wit:

Office of J. C. Montgomery, notary public.

COAL VALLEY, W. VA., *Aug.* 14, 1889.

STATE OF WEST VIRGINIA, *Fayette County,* } *ss:*

535 Personally appeared before the undersigned, in the county and State aforesaid, M. T. Davis, who, after being by the undersigned duly sworn, says that he is acquainted with the real property involved and in dispute in the suit for partition lately pending in the United States circuit court for the district of West Virginia, at Charleston, wherein John Halsted was plaintiff and A. G. Grinnan and others were defendants; that in affiant's judgment the value of said property in dispute in said cause, exclusive of costs, exceeds the value of five thousand dollars; that said value consists in its own value as a coal and mineral property and as an outlet for the "Forest Hill tract" of two thousand acres of land to the Great Kanawha river and the Chesapeake and Ohio Railway Co.

Affiant says he is a member of the firm of M. T. Davis & Co., engaged in the business of mining and shipping coal to market on Morris creek, in Fayette county, on property situated very near the said Forest Hill Co. tract.

536 That he is also interested in the Central Coal and Coke Company, which company is engaged in the business of mining & shipping of coal on New river, in said county.

M. T. DAVIS.

Taken, subscribed, and sworn to before me this 14th day of August, 1889.

C. ADKINS, *J. P.*

(Endorsed:) Late clerk of the county court of Fayette Co. & one of the most reliable & active coal men in Fayette Co.

The affidavit of Samuel Dixon, filed on said day, is in the words and figures following, to wit:

The Great Kanawha Colliery Company (Limited), Symington Macdonald, manager.

MOUNT CARBON,
FAYETTE CO., W. VA., *Aug.* 13, 1889.

STATE OF WEST VIRGINIA, *Fayette County,* } *ss:*

Personally appeared before the undersigned, in the county and State aforesaid, Samuel Dixon, who, after being by the under-
537 signed duly sworn, says that he is acquainted with the real property involved in controversy and in dispute in the suit for partition lately pending in the United States circuit court for the district of West Virginia, at Charleston therein, wherein John Halsted was plaintiff and A. G. Grinnan and others were defendants; that affiant feels satisfied that the value of said real property in dispute in said cause, exclusive of costs, exceeds the value of five thousand dollars; that said value consists in its own value as a coal and mineral property and as an outlet for the "Forest Hill tract" of two thousand acres of land to the Great Kanawha river and the Chesapeake & Ohio Railway Co.; that in affiant's judgment the value of said property in dispute in said cause *is* very considerably exceeds the value of five thousand dollars. Affiant says he has been engaged in the coal business in Fayette county, West Virginia, with the "Falkner mines" and the "Great Kanawha Colliery
538 Company" for eleven years past, whose properties border on the Forest Hill tract of 2,000 acres; that he knows the value of such property lying in this vicinity.

SAMUEL DIXON.

Taken, subscribed, and sworn to before — this 14th of August, 1889.

LEWIS WILLIAMS, *J. P.*

(Endorsed:) Gen. superintendent of the "Falkner mines" & the Great Kanawha Colliery Co.

NOTE.—By direction of A. Burlew, Esq., att'y for complainant, John Halsted, the order entered on Aug. 27, 1889, is omitted from this record.

L. B. DELLICKER, *Clerk.*

539 Supreme Court of the United States.

JOHN HALSTED
vs.
A. G. GRINNAN & Others. } In Chancery.

and

A. G. GRINNAN
vs.
S. C. LONG and Others. } In Chancery.

and

B. F. CHEWNING
vs.
J. F. COWAN. } In Chancery.

From the circuit court of the United States for the district of West Virginia.

Petition.

To the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States:

Your petitioner, John Halsted, a party to the cause above described, respectfully represents unto your honor that on the 15th day of June, 1889, W. K. Smith and wife, A. G. Grinnan and wife, and A. G. Grinnan, trustee, conveyed by deed to the Forest
540 Hill Mining and Manufacturing Co. two thousand acres of coal and timber lands lying in Fayette county, then in the State of Virginia, now in the State of West Virginia, just below Armstrong creek; also a certain piece or parcel of land known as the Huddleston tract, to be surveyed off the western side of said tract by a line running from the northerly to the southerly side of said tract, to be bounded on the south by the tract hereinbefore conveyed (the two-thousand-acre tract) and on the north by the Great Kanawha river, and containing 100 acres, more or less.

(See Exhibit B in Record, page 18.)

That on the same day the said deed was made to the Forest Hill Mining and Manufacturing Company the said company executed and delivered to Robert Soulter, trustee, a deed of trust or mortgage for said land to secure the payment of some forty thousand dollars of bonds which said company had issued.

(See Exhibit D in Record, page 38.)

That on the 6th day of June, 1864, the lands were sold by said trustee under the trust deed or mortgage and was purchased by your petitioner.

541 (See Exhibit E in Record, page 39.)

That the western half of the Huddleston tract — was to be laid off by said Smith and Grinnan at their expense in accordance with their said deed was to connect the said one-half with the said two-thousand-

acre tract, and thus give an outlet to the two-thousand-acre tract to the Great Kanawha river.

That at the time the said Smith and Grinnan made the said sale of said lands to the Forest Hill Mining and Manufacturing Company they exhibited the same by map and report made by one Dr. J. H. Salisbury, which they represented as showing the true location of said Forest Hill and Huddleston tracts and their relations to each other.

(See Exhibit — in Record, page 342.)

The lines represented on said map by the figures 5, 6, 7, 8, back to 5, were reported as showing the true location of the Huddleston tract; that said deed from Smith and Grinnan and said map and report were delivered to said company at the same time practically as one paper, and said company believed that said map correctly represented the location of said lands.

That shortly after the purchase of the lands by said com-
542 pany in 1859 said Smith and Grinnan, whose duty it was to lay off the said Huddleston tract according to their said deed, undertook to lay it off and said company believed that they had correctly complied with said deed until it was discovered several years after the war that a serious mistake had been made in laying off said land; that said company had no occasion to examine the lines run, in laying off said track, except to see that they were properly run on the river, where it was about to locate its buildings, and took no part in and did not accompany the surveyor in making the survey, except as above stated, but said company believed as a matter of course, until after the mistake was discovered, that said Smith and Grinnan had laid off said tract according to their deed to said company.

The said company took possession of the whole lands purchased from said Smith and Grinnan as aforesaid, according to the calls of its said deed, by erecting buildings of various kinds on the bottom next to the river and various other improvements and by
543 occupying the same, notoriously claiming the whole lands embraced in said deed to it according to its calls, except during the war, when it was compelled to abandon the property, and that since your petitioner became the purchaser of said lands he has been in continuous, uninterrupted, and undisputed occupancy of the whole of said lands by actually and openly occupying the same to the present time, notoriously claiming them to the exterior lines called for in said deed from said Smith and Grinnan to said company.

That as soon as said company became aware that in laying off said Huddleston tract that the surveyor had by mistake or misdirection laid off the same in violation of the said deed from Smith and Grinnan it repudiated the said survey which disregards the requirements of the said deed, and in like manner your orator has repudiated said survey since he became informed of said error.

The map in the record marked "T. S. R. No. 2," on page 377, shows correctly the actual location of the said Forest Hill tract of

two thousand acres and the said Huddleston tract and their
544 relation to each other and the division made by Smith and Grinnan by the survey made by them and hereinbefore referred to. Your petitioner saw this map for the first time in 1867. It will be seen by this map that the division made of the Huddleston tract by Smith and Grinnan is so made that the part retained by them by this survey intercepts the part laid off to said company from the Forest Hill tract of two thousand acres so that they do not join each other.

That on the 24th day of January, 1885, your petitioner filed his bill in chancery in the district court of the United States for the district of West Virginia, having circuit court powers, against A. G. Grinnan and others, praying for a partition of the said Huddleston tract according to the said deed from said Smith and Grinnan to said company, in which cause the foregoing and following facts and papers appear.

(See copy of bill in Record, on page 2, &c.)

And on the 30th of Nov., 1887, an amended and supplemental bill was filed by your petitioner in said cause.

(See Record, page 446, &c.)

545 That your petitioner is also a party to the said cause of A. G. Grinnan against S. C. Long and others, which causes were heard together in the said circuit court of the United States.

That on the 26th day of May, 1888, said cause came on to be heard, when said court entered its decree dismissing your petitioner's said bill and amended and supplemental bill and awarded costs against him.

(See copy of decree in Record, on page 484.)

That during the term of said court in which said decree was entered your petitioner filed in said cause his petition for a rehearing of the cause.

(See petition in Record, on pages 486, 487.)

That on the 27th day of May, 1889, said causes came on for rehearing, when said court overruled your petitioner's motion for a rehearing and dismissed his said petition.

(See order in Record, on page 511.)

The said circuit court of the United States had jurisdiction of said cause and the property in dispute in said cause, exclusive of costs, exceeds the value of five thousand dollars.

(See Record, pages 525 to 538, inclusive.)

546 Your petitioner is advised that there is error in said decree by which his said bill was dismissed, and that there is also error in the said decree dismissing the said petition.

Your petitioner says that the said Huddleston tract was capable of division according to the deed from Smith and Grinnan to the Forest Hill Mining and Manufacturing Company, and that he has been in the peaceful occupancy of the lands and premises up to the

time of the institution of said suit, and that he has been guilty of no laches by which the doors of a court of equity should be closed against him.

For the foregoing reasons petitioner prays for an appeal from said two decrees and that the same may be reversed.

(Signed) JOHN HALSTED,
By A. BURLEW,
His Attorney.

The foregoing petition granted and appeal allowed.

(Signed) MELVILLE W. FULLER,
Chief Justice U. S.

November 8th, 1889.

(Endorsed:) "Circuit court U. S., dist. W. Va. Filed in office this 4th day of June, 1890. L. B. Dellicker, clerk."

547 Know all men by these presents that we, John Halstead, as principal, and George B. Patterson, as sure*ties*, are held and firmly bound unto A. G. Grinnan, The Forest Hill Mining and Manufacturing Co., Robert Soulter, trustee, William Wyant, and the unknown heirs of William K. Smith, deceased, in the full and just sum of one thousand dollars ($1,000.00), to be paid to the said Grinnan *et al.*, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fourth day of November, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately, at a term of the circuit court of the United States for the district of West Virginia, in a suit depending in said court between John Halstead, complainant, and A. G. Grinnan, The Forest Hill Mining & Manufacturing Co., Robert Soulter, trustee, William Wyant, and the unknown heirs of William K. Smith, deceased, defendants, a decree was rendered against the said complainant, and the said complainant having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said defendants, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said John Halstead shall prosecute his appeal to effect and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN HALSTEAD. [SEAL.]
GEO. B. PATTERSON. [SEAL.]

Sealed and delivered in presence of—
LAWRENCE KNEELAND.

Approved by—
ADDISON BROWN,
U. S. Dist. Judge for the Southern District of New York.

And I certify that I consider said sureties good & sufficient.

ADDISON BROWN, *U. S. D. J.*

Approved by—

M. W. FULLER,
Chief Justice.

548 [Endorsed:] John Halstead, appellant, *vs.* A. G. Grinnan *et al.*, respondent-. Bond for costs.

UNITED STATES OF AMERICA, *Southern District of New York*, } *ss:*

On this 4th day of November, 1889, before me personally appeared John Halstead and George B. Patterson, to me known to be the individuals described in and who executed the within bond, and severally acknowledged that they executed the same.

LAWRENCE KNEELAND,
[NOTARY'S SEAL.] *Notary Public, Kings Co.*

Certified in N. Y. Co.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

John Halstead, being duly sworn, says that he resides in the city of New York, is a householder therein, and is a freeholder in the State of West Virginia, and is worth the sum — two thousand dollars over and above all his just debts and liabilities.

JOHN HALSTEAD.

Sworn to before me November 4, 1889.

LAWRENCE KNEELAND,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

George B. Patterson, being duly sworn, says that he resides in the city of New York; is a householder therein, and is worth the sum of two thousand dollars over and above all his just debts & liabilities.

GEO. B. PATTERSON.

Sworn to before me Nov. 4, 1889.

LAWRENCE KNEELAND,
[NOTARY SEAL.] *Notary Public, Kings Co.*

Cert. filed in N. Y. Co.

(Endorsed:) "Circuit court U. S., dist. W. Va. Filed in office this 4th day of June, 1890. L. B. Dellicker, clerk."

549 UNITED STATES OF AMERICA, *ss:*

The President of the United States to A. G. Grinnan, the Forest Hill Mining and Manufacturing Company, Robert Soutter, trustee; William Wyant, and the unknown heirs of William K. Smith, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to an order allowing an appeal filed in the clerk's office of the circuit court of the United States for the district of West Virginia, wherein John Halstead is appellant and you, with others as aforesaid, are appellees, to show cause, if any there be, why the decree rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this eighth day of November, in the year of our Lord one thousand eight hundred and eighty-nine.

MELVILLE W. FULLER,
Chief Justice United States.

550 [Endorsed:] Service of the within citation accepted for Wm. Wyant, def't, J. F. Broun, att'y, Nov. 11, 1889, and S. A. Miller, of counsel for A. G. Grinnan, Nov'r 11, 1889. Service of the within citation accepted for the Forest Hill Mining and Manufacturing Company and Robert Soutter, trustee, by A. Burlew, att'y, Nov. 11th, 1889.

551 UNITED STATES OF AMERICA:

To A. G. Grinnan, trustee; S. C. Long, G. W. Norris, P. W. Morgan, late sheriff of Kanawha county, and as such adm'r of William K. Smith, deceased; Gustavus B. Wallace, Edward Carter, Patsy Dellard, the personal representative of William J. Roberts, whose name is unknown; Jas. Gray, Louisa B. Hoe, and William H. Fitzhugh, ex'r of H. H. Parton; —— Emanuel (whose baptismal name is unknown), adm'r of H. Philips; George Hamilton, F. B. Chewning, in his own right and as adm'r of Abigail H. Smith; T. L. Broun, and all creditors of William K. Smith whose debts are acknowledged in writing by him to be just, impleaded with A. G. Grinnan, the Forest Hill Mining and Manufacturing Company, Robert Soulter, trustee; William Wyant, and the unknown heirs of William K. Smith, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to an order allowing an appeal filed in the clerk's office of the circuit court of the United States for the district of West Virginia, wherein John Halstead is appellant and you, with others as aforesaid, are appellees, to show cause, if any there be, why the decree rendered against the said

appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 12th day of February, in the year of our Lord one thousand eight hundred and ninety.

MELVILLE W. FULLER,
Chief Justice of the United States.

552 Service accepted for Wm. Wyant, to have the same — as if served by U. S. marshal on said Wyant.
March 11, 1890.

J. F. BROUN, *Att'y.*

Service accepted for the Forest Hill Mining and Manufacturing Co., John Halstead, & Robert Soulter, trustee.
March 11, 1890.

A. BURLEW, *Att'y.*

Service accepted for F. B. Chewning in his own right and as administrator of Abigail H. Smith.
March 22, 1890.

JOHN W. HARRIS, *Att'y.*

Served the within citation on A. G. Grinnan, trustee; J. F. Cowan, S. C. Long, J. W. Norris, Abigail Smith, adm'r of William K. Smith, and the creditors of William K. Smith by delivering a true copy thereof to Wesley Mollohan, att'y, of the late firm of Mollohan & Jackson, att'ys of record for said parties, this 2nd day of April, 1890, the said parties being non-residents of the district of West Virginia and not found therein; and as to Gustavus B. Wallace, Edward Carter, Patsey Dillard, the personal representative of *of* William J. Roberts, Louisa B. Hoe, and William H. Fitzhugh, ex'r of H. H. Parton; —— Emanuel, adm'r of H. Philips, and George Hampton, not served, because said parties have not been found and it is reported that said parties are non-residents of the district of West Virginia.

R. C. DAWSON,
Dept. U. S. Marshal.

Marshal fees, $2, paid by A. Burlew.

Service accepted.

THOS. L. BROUN.

Service accepted.

P. W. MORGAN, *Administrator.*

553 I, L. B. Dellicker, clerk of the circuit court of the United States for the district of West Virginia, do hereby certify that the foregoing is a true transcript as taken from the records and papers in my office in the chancery causes of John Halstead *vs.* William Wyant & others, F. B. Chewning *vs.* J. F. Cowan & others, and A. G. Grinnan *vs.* S. C. Long & others, excepting such orders and other papers as are omitted therefrom by direction of A. Burlew, Esq., counsel for complainant John Halstead, at whose instance

the above transcript was made; and I do further certify that the printed record of the cause of Grinnan *vs.* Long accompanying the foregoing transcript and marked "copy of printed record filed May 4, 1887, L. B. Dellicker, clerk," is a true copy of the record on file in my office and referred to in the foregoing transcript.

Seal Circuit Court United States, District West Virginia, Charleston, West Va.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this fourth day of June, A. D. 1890, and in the 114th year of the — United States of America.

L. B. DELLICKER,
Clerk U. S. C. C., D. W. Va.

Fees for record, $275.49, paid by A. Burlew, att'y for Jno. Halstead.

554 Supreme Court of Appeals of West Virginia, Charleston.

A. G. GRINNAN, Plaintiff Below, Appellant,
against
S. C. LONG and Others, Defendants Below, Appellees.

From circuit court of Greenbrier county.

Judges: Hon. Okey Johnson, president; Hon. A. F. Haymond, Hon. T. C. Green, Hon. Jas. F. Patton; O. S. Long, clerk.

555 Supreme Court of Appeals of West Virginia, Charleston.

A. G. GRINNAN
vs.
S. C. LONG and Others.

Petition.

To the honl. the judges of the supreme court of appeals of West Virginia:

The petition of Andrew G. Grinnan, of Orange county, Virginia, respectfully represents that he feels aggrieved by a decree rendered by the circuit court of Greenbrier county on the 10th day of November, 1880, in a cause therein depending in which your petitioner is plaintiff and S. C. Long and others are defendants.

The decree complained of may be found on pages 182, '3, '4, and '5 of the manuscript record filed with this petition.

There appears to have been three suits brought in the circuit court of Fayette county against the trust fund represented
556 by your petitioner, and which was of the estate of Wm. K. Smith. First, the suit of B. F. Chewning against J. F. Cowen & *al.;* second, of John F. Cowen against Sydney C. Long and others, and, third, the case of your petitioner against S. C. Long and others, referred to in the above statement.

The second of said causes was on the 23d of May, 1872, dismissed

by consent of the parties at the costs of the defendant, his claim having been settled (page- 24, '5), and your petitioner was directed by an order made in the case of Chewning *vs.* Cowen & *al.* to settle his trust accounts before Com'r John A. Preston, in which settlement your petitioner was to be credited with $8,000 paid to said Cowen in full of his claims.

The bill, exhibits, and orders made in the case of Chewning *vs.* Cowen & *al.* being referred to in the bill and proceedings of your petitioner against said Long and others, with a prayer that they be made parts of your petitioner's bill or petition, whichever it may be called, in which bill there is also a prayer that the same be received and treated as a cross-bill to the bill of said Chewning, and from the fact that the two cause- were heard together, the said bill, exhibits, and orders are copied separately, and the record thereof is filed herewith, without supposing that they will be at all material upon the hearing of these causes in this honorable court.

It will be seen from the record that all the aforesaid parties claimed to have some interest in the estate of the aforesaid Wm. K. Smith, and it will also appear that said Smith, as to personal property, died insolvent. It will also appear that the said Smith's estate consisted of unproductive real estate principally, if not entirely, in the county of Fayette, State of West Virginia; that on the 29th day of October, 1857, the said Smith conveyed these lands or the most of them to your petitioner, without condition, with the hope that sales could be the better made by him than if the trusts were declared on the face of the deed. The trust had been declared in an instrument executed cotemporaneously with the deed, but it was not recorded. But this turned out to be a mistake, and with
557 a view of letting the public know what they were on the tenth day of February, 1852, the said Smith and your petitioner executed a new instrument declaratory of the trusts aforesaid (see page 17), by which instrument the power to sell publicly or privately was retained by your petitioner, and when a sale should be made by him it indicated how the proceeds should be applied; among other debts recognized by said instrument there was one to Mrs. Abigail Smith, estimated to be $25,000, the interest thereon to be paid annually; a debt to said Chewning, &c., &c.

Before the filing of your petitioner's cross-bill or petition, as it may be called, various orders had been made in the case of Chewning *vs.* Cowen & *al.*, by which orders accounts had been directed, reported, and confirmed. These were all limited in their extent, having reference to the accounts growing out of the trust aforesaid, but the cross-bill sought to have everything settled by the chancellor—both the trust fund, the payments made, and the outside debts due from said Smith, but chargeable secondarily upon the trust fund. There was a peculiarity in one class of debts; they were to have been approved in writing by the said Smith.

In the cases of Chewning *v.* Cowen & *al.* several orders for account had been made, reported, and confirmed, and after your petitioner became a party a further order for an account was made, which was acted on by the com'r and reported to the court, and at the April

term, 1880, of the Fayette court these causes came on to be heard together—the 5th day of April, 1880—the first (the Chewning case) on the papers formerly read, and the latter (the case of your petitioner against Chewning & *al.*) upon the exhibits and report of John A. Preston, special com'r, with the objections to a hearing upon said report, it not having been filed 20 days, and the court, without deciding upon the said objections, ordered the said report to be recommitted to said com'r to be acted upon by him and reformed if necessary; that he receive additional evidence, &c., &c. Before taking said account said com'r should give notice of the time and place of taking said account to the plaintiff, Grinnan, and John L. Marye, counsel for the creditors, &c., &c.

558 And upon the motion of John L. Marye, on behalf of the creditors, who filed his affidavit in support of his motion, it was ordered that your petitioner be summoned to appear before the court on the first day of the then next term to show cause why the trust fund found to be in his hands by said report of Com'r Preston should not be paid into court; and, for reasons appearing to the court and by consent of the parties, these causes were transferred to the circuit court of Greenbrier county, and it was ordered that the aforesaid rule be made returnable to that court (pages 35 and *and* '6). On the 3d of June, 1880, the causes were docketed in the said circuit court of Greenbrier county (page 37).

On the first day of November, 1880, the causes were continued, and report of Com'r Preston was recommitted, with instructions to hear further proof and report upon certain questions indicated in the order.

By the report made in March it appeared that there was in your petitioner's hands of funds derived from the estate of said Wm K. Smith the sum of $21,013.24 (see page 49). There were various exceptions to said report which were not acted upon by the court.

On the 23d day of October, 1880, Com'r Preston closed his report and filed the same (see page 57).

On the 10th day of November, 1880, the causes came on again to be heard upon the reports of Com'r Preston, with the exceptions to said reports, the petitions of your petitioner and Tift, assignee of Dodge, Bacon & Co.; affidavits of A. G. Grinnan, John L. Marye, and F. B. Chewning and the exhibits filed therewith, with the exceptions of A. G. Grinnan endorsed on said affidavits and papers filed therewith, and upon the answers of A. G. Grinnan to the rule awarded against him at the last term and the decree entered in the causes upon a former day of the term; whereupon this last decree was set aside. Reports were recommitted to Com'r Preston with instructions, and it was recited in the decree that it appeared to the court from the reports of Com'r Preston that there was in the hands of your petitioner $21,013.24 *cents* belonging to said trust fund. It

559 was accordingly adjudged and ordered that the exceptions to said affidavits be overruled; that your petitioner, within 60 days from the date of said decree, pay over to the receiver of this court the said money and all other money belonging to said

trust and deliver to said receiver all choses in action and evidences of debt and personal property belonging to said trust, &c.

This decree was rendered under circumstances somewhat peculiar, the causes having been continued and the reports recommitted on a previous day of the court, your petitioner's counsel, and the only one whom he had employed, having gone to the Federal court at Charleston, and your petitioner being confined to his sick bed at home in Orange county, Va.; but it is true his counsel had spoken to his friend, Capt. Dennis, to attend to the case if anything should be required in his absence, and his said counsel being telegraphed to return, as the counsel on the other side were arguing the case, who returned in time merely to see entered the decree aforesaid, which he is advised contains many errors, some of which he will proceed to point out:

First. The causes should not have been heard after they had been continued.

Second. The report of Com'r Preston had not been filed more than three days before the term of the court commenced, and only 17 days before the decree was rendered. It had not been filed long enough to authorize the court to act upon it.

Third. Whilst the court seemed to be sensible of the fact that the report had not been filed long enough for judicial action, yet it made it, to a great extent, the foundation of its judicial action, as is shown by its recitals in the decree.

Fourth. According to those recitals it committed a plain error in this, that it is recited that it appeared by said com'r's report that there were $21,013.24 in your petitioner's hands of the trust funds. This is not correct. That sum appeared in the March report, but in the report made in October it was reduced to $90.82 *cents*. So that the *pre*emptory order to pay the said sum of $21,013.24 into the hands of the receiver is palpably erroneous. (Page 61.)

560 Fifth. The court should have declined, under the law and circumstances of the case, to have acted upon the case, but when it did act it should have acted upon the exceptions to the report also.

Sixth. Until the report was confirmed it was not primary evidence of anything, but was merely secondary evidence, and could afford no proper foundation for judicial action. It contained merely the conclusions of the com'r, which might or might not be correct, but had no judicial vitality of its own.

Seventh. The affidavits of Messrs. Marye and Chewning ought not to have been read by the court. They were merely *ex parte*, and for that reason inadmissible; and if they were sworn to at all it was done before an officer, if officer at all, whose acts the court could not recognize. So the court ought to have sustained the exceptions thereto and ought not to have overruled them. "*Ex parte* affidavits are not allowed to be read in support of an answer on a motion to dissolve an injunction."

Roberts & Boyd *vs.* Anderson, 2 John.'s Ch'y Rep., 202.

Eighth. The rule to shew cause why the trust fund found to be in your petitioner's hands by the report of Com'r Preston shall not be paid into court was insufficient to notify your petitioner of the assumed causes for such action. Why should the fund be paid into court? Was your petitioner abusing his trust in any way? Was he insolvent or likely to become so? Or what was the matter? It may be answered that the affidavit of Gov. Marye discloses the object, but this is not so, and even if it did it would not justify the decree aforesaid. It shows no want of diligence and care in the trustee and no insolvency. On the contrary, it shows him to be rather a wealthy man for down-trodden old Virginia—700 acres of land on Robinson's river or the Rapidan is a good estate and worth, as the affiant himself believes, $20,000, which might, however, be slow of realization. These $20,000 in property might be equal to the receiver's bond, *of* which was in a penalty of only $20,000, and this estimate is exclusive of his West Va. lands.

561 Ninth. All the affidavits combined, the two of Gov. Marye and of one of Dr. Chewning, do not show a case in which the court can properly interpose to remove the trustee. They show nothing but frankness and candor on the part of the trustee—possibly, in the opinion of some, a little tardy; but let him who cries out against him for more speed try his hand at selling the hills and hollows of Fayette, with sometimes a suspicious title, at least doubtful enough to make every one distrustful, and collecting and paying over the purchase-money, and he will say that perhaps he is a little extreme in his precipitancy.

"A court of — will not in general assume the exercise of a discretionary power vested in a trustee, nor interfere to control a trustee acting *bona fide* in the exercise of his discretion, nor will a suit be entertained to compel a trustee to exercise his powers."

Cochran *vs.* Paris, 11 Grat., 348.

"Mere disagreements between the trustee and *cestui que trusts* will not justify a removal, and if a trustee fail in the discharge of his duties from an honest mistake or mere misunderstanding of them, or from a misjudgment, it is no ground for removal."

1 Perry on Trusts, § 276, page 350.

"In removing a subsisting trustee the court does not act arbitrarily, but upon certain general principles and after full consideration of the case. Courts will not substitute trustees upon the mere caprice of the *cestui que trust.* or without reasonable cause, and although the instrument of trust or statute gives the *cestui que trust.* full power to remove and appoint other trustee, yet good cause must be shown or the court cannot be put in motion."

1 Perry on Trusts, 350.

Macher *vs.* Sehon, 14 West Va., 782–'3.

In our case the court did not ever say to Dr. Grinnan that he must give security for the fa-thful discharge of duties or be removed,

but whether the accounts reported by Com'r Preston were
562 right or wrong he must surrender the fund, and more than any fund pretended to have been ascertained to be due. The affidavits of both gentlemen shows that Dr. Grinnan always disclosed to them frankly the condition of the trust fund. There was no concealment about him, but he never claimed before any security, as they say, for his threatened liability on account of his covenants of warranty with John Halstead nor on account of the right of way through the Elk Ridge tract. These questions had not then arisen, but now there is a suit which will test one of those questions pending in the Federal court, and if he (your petitioner) pay the trust money over it will be gone forever. Smith conveyed with general warranty, and your petitioner conveyed to Halstead in the same way.

Tenth. There is no responsible person on the record prosecuting this rule. Gov. Marye says he represents nine-tenths of the creditors of this fund, but who are they? Let them be named before we are called to respond to them. When this decree complained of shall be reversed against whom will judgment for costs be rendered? Not against Gov. Marye, for he is no party. He is merely counsel and there is not a name given and upon record whom we can pursue for costs. These outdoor declarations amount to nothing. We must be governed by the record. Who does the record say is prosecuting this rule? Nine-tenths of the creditors. But what are their names? The affidavits of the creditors, as they profess to be, would not make them parties. A declaration that charged that A or B slandered another would not authorize that other to bring suit against either, nor would a promise against one of two be sufficient. There must be a certainty of the wrong-doer—of the party doing the injury.

For these and many other reasons which might be assigned your petitioner humbly prays your honors for an appeal from the decree aforesaid, to wit, the decree of the 10th of November, 1880, and that your honors may prescribe an alternate penalty of the appeal bond to be given, as it may not be practicable to give personal security in West Virginia for the whole amount of the
563 decree to obtain an appeal with supersedeas, whilst it will be practicable to give such security to obtain the appeal without supersedeas. He prays that said decree may be reviewed and reversed, and such other decrees entered as may be proper, according to the rules of law and equity; and, as in duty bound, he will ever pray, &c.

The court of appeals has jurisdiction of the case by appeal, because the decree complained of requires money to be paid and the possession and title of property to be changed. (See Kelly's statutes, chap. 161, § 1, 7th paragraph, 2d vol., page 918.)

ANDREW G. GRINNAN,
By his attorney, SAM'L PRICE.

Jan'y 6th, 1881.

I am humbly of opinion that the decree complained of in the foregoing petition ought to be reviewed in the supreme court of appeals.

SAM'L PRICE.

Jan'y 6th, 1881.

An appeal was allowed in court at Charleston, Jan'y 20, 1881, from so much of the decree rendered in this cause on the 10th day of November, 1880, as ascertains that there are in the hands of Andrew G. Grinnan, trustee, $21,013.24, belonging to said trust fund, and also from so much of said decree as overrules the exceptions to the affidavit in said decree mentioned and referred to, and as decrees that the said Grinnan shall, within 60 days from the date of said decree, pay over to Alexander F. Mathews, receiver of said circuit court, said money and all other money belonging to said trust fund, and shall deliver to said receiver all choses in action and evidences of debt and personal property belonging to said trust held by him or under his control, bond being required in the penalty of $400; and an appeal with supersedeas was granted to the petitioner from and to the part of the decree aforesaid upon bond being given in the penalty of $26,000.

Attest: O. S. LONG, *Cl'k.*

564 *Record.*

WEST VIRGINIA:

Pleas before the judge of the circuit court of Greenbrier county on the 10th day of November, 1880.

Be it remembered that heretofore, to wit, on the — day of ——, 1878, came A. G. Grinnan, by counsel, and sued out of the clerk's office of Fayette county, W. Va., a summons in chancery against S. C. Long *et al.*, which was subsequently returned executed on the defendants therein named, and, no exceptions being taken to said summons and return, the same is omitted from this record.

At a circuit court continued and held in *in* and for the county of Fayette on the 30th day of August, 1878.

F. B. CHEWNING *vs.* JNO. F. COWAN, &c. } In Ch'y.

This day came A. G. Grinnan, in his own right and as trustee under deeds executed by Wm. J. C. Smith, dated Oct. the 29th, 1857, and Febr'y the 10th, 1859, and filed his bill in the nature of a cross-bill in this case, on which process is awarded.

And at another day, to wit, at rules held in the clerk's office of said county on the 1st Monday in November, 1878, came A. G. Grinnan, by counsel, and filed his bill *vs.* S. C. Long *et al.*, which, with the exhibits therein referred to, *are* in the words and figures following, to wit:

565 *Bill of Complaint.*

A. G. GRINNAN, in his own right and as trustee under deeds executed by Wm. J. C. Smith, dated October 29th, 1857, and Feb'y 10th, 1859, Plaintiff,

vs.

S. C. LONG, G. W. NORRIS, P. W. MORGAN, late sheriff of Kanawha county, and as such sheriff committee adm'r of Wm. K. Smith, dec'd; Gustavus B. Wallace, Edward Carter, Patsy Dellard, the personal representative of Wm. J. Roberts, whose name is unknown; Jas. Gray, Louisa B. Hoc, and Wm. H. Fitzhugh, ex'or of H. H. Parton; —— Emanuel (whose baptismal name is unknown), adm'r of H. Philips; George Hamilton, The Forest Hill Mining and Manufacturing Company, John Halstead, F. B. Chewning, in his own right and as adm'r of Abigail H. Smith, and all creditors of Wm. Smith whose debts have been acknowledged in writing by him to be just and who are entitled to any share of the trust fund created by the aforesaid deeds to A. G. Grinnan of 29th of October, 1857, and of the 10th of Feb'y, 1859, whose name- are unknown, Defendants.

The plaintiff complains and says that on the — day of ——, 187–, F. B. Chewning filed his bill in the circuit court of Fayette county, West Virginia, against this plaintiff (A. G. Grinnan, in his own right and as trustee aforesaid), J. F. Cowan, S. C. Long, J. W. Norris, Abigail Smith, P. W. Morgan, sheriff, committee adm'r of Wm. K. Smith, and the creditors of Wm. K. Smith whose debts he has acknowledged in writing to be just, but whose names are unknown; that in the said bill he alleged that Wm. K. Smith, who at the time owned the property thereinafter more particularly described by a deed dated Oct. 29th, 1857, conveyed on its face in fee simple to A. G. Grinnan the following real estate in Fayette county, West Virginia, viz., 43,000 acres, more or less, which was conveyed by Wm. H. Edwards to said Smith Dec'r 2d, 1852; also the interest of said Smith in 7,000 acres of land on Armstrong creek, conveyed to said Smith by said Edwards on the 1st of August, 1853;

566 also the remaining half of 200 acres of land on the Kanawha below Armstrong creek, being the tract contracted to be conveyed to said Edwards for the benefit of said Smith by George Huddleston; also a tract of 15 acres patented to L. H. Brannan on 11th Nov'r, 1854, and conveyed to said Smith by the said Edwards on the 7th of October, 1857; that although this deed from Wm. K. Smith to the said A. G. Grinnan of the 29th of October, 1857, was on the face a deed of absolute direct conveyance of the entire subject in fee simple to the said A. G. Grinnan, there was in fact a secret trust as to the great part of the said property, coupled with said conveyance; it was, at the time of said conveyance, believed that the said A. G. Grinnan would be able to effect a sale of said property in a very short time, and that a direct absolute conveyance of the whole subject to him in fee simple would facilitate

such sale and simplify the conveyance to any one or more purchasers; that after a lapse of some time, without a sale having been effected, at the suggestion of said Grinnan it was determined to express in writing the precise intention of the parties to said deed and the character of the secret trust coupled therewith; accordingly, on the 10th of Feb'y, 1859, they entered into a written agreement by which the nature, extent, and object of the said secret trust were set forth and the powers and duties of the said Grinnan were defined; that in the recitals of said agreement it was set forth that by the aforesaid deed of 29 Oct., 1857, the said Smith conveyed to said Grinnan all of said property, to wit: One-half of Forest Hill tract of 2,000 acres, the other half having been conveyed to said Grinnan in fee simple; also a tract of 15 acres named in said deed of Oct. 29th, 1857 (one-half of which said Grinnan holds in fee simple, holding the other half for the purposes thereinafter named), together with the remaining part of Wilson's survey lying east of Mt. Carbon Company and supposed to contain 35,000 acres, which is the same tract before described as containing 40,000 acres, of which 12,000 had been conveyed to secure a debt due to Gustavus B. Wallace; that after these recitals the said contract and agreement proceeds to state that "therefore it is understood and agreed that
567 the said Grinnan shall hold one-half of the 15 acres in fee simple, and that the remaining half of the property conveyed in the said deed, viz., one-half of the Huddleston tract (the other half having been conveyed to said Grinnan in fee simple by said deed of Oct. 29th, 1857), one-half the 15-acre tract and the balance of the Wilson survey shall be held by the said Grinnan in the following manner, viz: that he shall have the right to create liens on said property to raise money to pay expenses incident to selling it; that he may sell said property or any part of it at private sale, and after six months at public sale, upon such terms as he may deem best, paying from the net proceeds of sale the debts due or which may become due said Grinnan from said Smith, or for which said Grinnan may be or become bound as security for said Smith, either before or after the date of said agreement, including, among other items, several debts due said Grinnan and specially recited in said agreement, one of which is due to him as guardian of the children of Wm. H. Conway, together with expenses incurred in selling or endeavoring to sell said property and a proper remuneration to said Grinnan as trustee, but not to be less than 5 per cent.; 2d, to pay, after said claims (which are of the first class), the debts acknowledged in writing by the said Smith to be just (except the claim of Dodge, Bacon & Co. otherwise provided for), including $25,000 due to Mrs. Abigail Smith, the wife of said Wm. K. Smith, to be held in trust by said Grinnan for her separate use and benefit and subject to her disposal by will or order, the interest thereon to be paid annually; also the sum of $10,000 due to said complainant, the exact sum supposed to exceed this sum; that said complainant, in his said bill, alleged that the said sum intended to be thus provided for did actually exceed the said amount of $10,000.00; that said agreement was admitted to record on the 10th of March, 1859, in the clerk's

office of the county court of Fayette county, West Virginia; that at the time of said agreement and down to his death the said Wm. K. Smith was deeply embarrassed by his debts; *her* further alleged that the said A. G. Grinnan had recently sold to S. C. Long and G.
568 W. Norris the said tract of 35,000 acres and the said 5,000 acres, except some small parcels thereof which he had previously sold to others; that a sale of said property was necessary to redeem it from tax sale, the time for redeeming which had nearly expired, and also to prevent a sale of said 12,000 acres under the aforesaid trust deed in favor of Gustavus B. Wallace; that after this sale had been made one J. F. Cowan came forward and asserted a claim to the said property; that said complainant made other allegations in his said bill in regard to the said J. F. Cowan which need not be here repeated, because all the questions put in issue by the said bill, so far as the said Cowan was concerned, have been compromised and settled, that by said bill the said plaintiff prayed that proper parties therein named should be made parties defendants thereto; and besides praying for relief against the said Cowan he prayed that the said Grinnan be required to *to* show what land he had sold to said Norris and Long and for what price; that Norris and Long be required to file with their answers a copy of their contract with Grinnan; that said Grinnan be required to apply the purchase-money received from said Norris and Long to the purposes of the trust, and especially to pay the debts secured to the said complainant according to the amount actually due, and for general relief.

Your orator further alleges that on the 23d of May, 1872, a decree was entered by the *the* consent of the parties in the said cause in which it was ordered that your complainant, A. G. Grinnan, do settle his trustee accounts before John A. Preston, Esq., who was thereby appointed a commissioner for that purpose, and was authorized to take, state, and report said accounts, in which he was directed to credit your complainant, Grinnan, with the sum of $8,000 paid the aforesaid John F. Cowan and his assignees on the 7th of May, 1872, upon compromise; and notice of the time and place of taking said account was directed to be published in a newspaper in the town of Lewisburg for four successive weeks, to be equivalent to personal service, and to report his proceedings; that under said decree
569 your orator, A. G. Grinnan, made a settlement before the said commissioner as trustee, and said commissioner stated said accounts and made report thereof to the court; that on the 1st of April, 1873, the said cause came on to be heard upon the papers formerly read and the said report, to which there was no exception, and said decree, after reciting that "it appearing from said report that on the 15th day — June, 1872, the trust estate held by said A. G. Grinnan was indebted to him, as trustee, in the sum of $2,832 60 cents," "decreed that the said A. G. Grinnan recover against said trust estate the debt and interest aforesaid until paid and the costs expended by him in said suit, with the amount whereof he shall be entitled to a credit in his future settlement as trustee;" and by the said decree said Preston, as commissioner, was ordered to *to* take and report any subsequent accounts

which may accrue with said trustee, and he was directed to give notice of the time and place as before ordered or by personal service, and on the 28th of August, 1873, another decree was entered in said cause in which it was "decreed that the order made in this cause at a previous term of the court directing an account to be taken by John A. Preston, special commissioner of accounts of the said Grinnan as trustee, be so enlarged as to require the said commissioner, Preston, to convene all the creditors of the trust fund in the hands of said trustee by publication of the time and place of taking said accounts and notice to all said creditors to appear and produce their debts, duly verified, for six consecutive weeks in the Greenbrier Independent, a newspaper published in the town of Lewisburg, and posted for four weeks at the court-house door of this (Fayette) county, and report the same to court with the evidence on which the same is based; that on the 31st of March, 1874, another decree was entered in the said cause in the following words, viz: "This cause came on to be heard upon the papers formerly read and report of Commissioner Jno. A. Preston, appointed to settle with A. G. Grinnan, trustee and defendant in this cause, to which report there is no exception filed, and was
570 argued by counsel; on consideration whereof it is adjudged, ordered, and decreed that said report be confirmed, and that said commissioner, Preston, continue to take, state, and report upon the accounts of the said A. G. Grinnan, trustee, from time to time until the trust shall be closed and completed after convening the parties and creditors by publication in a newspaper published in the town of Lewisburg for four successive weeks and at the court-house door of this county fixing the time and place of taking said accounts; and it is further adjudged, ordered, and decreed that the said Grinnan proceed to collect the debts coming to him as such and pay over and satisfy the debts in the first, second, and third class in their order as ascertained in the report of said Commissioner Preston, and that he continue to make annual settlements before said commissioner until the duties of his trust shall be fully closed." (Copies of said decrees are — as Exhibits 1, 2, 3, 4.) That the debts which your complainant was directed to collect by the last-named decree were due on account of the sale of lands in West Virginia named and described in the aforesaid agreement between said Wm. K. Smith and the said A. G. Grinnan, dated Feb. 10th, 1859, in which the trusts confided to said Grinnan as to the said lands were set forth, defined, and limited; that besides the lands sold to Norris and Long there were several other parcels of the aforesaid lands sold to other parties who afterwards failed to pay for them and proved to be insolvent, and said sales were consequently cancelled; that these lands are a part of the Loup Creek tract of 35,000 acres sold to Norris and Long, but which had been sold before the sale to Norris and Long, and were consequently excepted from the sale to them. These parcels of land contain about 200 or 300 acres; that besides these there remains one-half of another tract of 125 acres lying below the mouth of Armstrong creek, in the said county, which also remains unsold, one-half of

which belongs to said trust estate; that these lands ought to be sold, inasmuch as there will be a deficiency of the trust estate for the payment of the debts to which said trust estate has been dedicated by the aforesaid deeds; that some time prior to
571 the late civil war the Forest Hill tract was sold to the Forest Hill Mining & Manufacturing Co. and conveyed to the said corporation by the said Wm. K. Smith and wife and A. G. Grinnan and wife and the s'd A. G. Grinnan as trustee; that prior to said conveyance the said Wm. K. Smith and wife had conveyed to your complainant one-half of the Forest Hill tract of land by deed with covenant of general warranty; that in the said deed to the Forest Hill Mining and Manufacturing Co. the said Smith covenanted with said company to warrant generally the remaining half of the said property which he had not theretofore conveyed to A. G. Grinnan, and the plaintiff, A. G. Grinnan, warranted generally the title to that half of the said property which the said Wm. K. Smith had conveyed with general warranty to him, and as trustee the said Grinnan conveyed with special warranty that half of said tract of land which Smith and wife conveyed to said company; that the said Forest Hill Mining and Manufacturing Company subsequently sold and conveyed by deed with general warranty all of the said Forest Hill tract to one John Halsted; that not long since and subsequent to the conveyance to him the said John Halstead instituted a suit in the circuit court of the United States against a certain party for the recovery of a part of said land, which part the said party had taken possession of; that the said suit is still pending and undetermined; that the plaintiff does not know the precise amount of said land thus in controversy, but from the *the* information he has he believes it is about 100 acres; that if the said Halsted fail to recover the said land which is involved in the said suit he will no doubt claim to have recourse back upon the said Wm. K. Smith as to that half of which he conveyed with general warranty, and upon the plaintiff for the other half, and your orator will have recourse back upon Smith for whatever liability he may be under, if any, to the said Halsted; that if such liability against your orator be ascertained and established against him he will assert his right to have it paid or reimbursed to him as a debt or liability of said Smith to him, provided for in the deeds of Oct.
572 29th, 1857, and Feb'y 10th, 1859, in the first class; that enough of the trust fund ought to be retained to meet the aforesaid contingent liability; that in said deed of Grinnan, trustee, Grinnan and wife, and Smith and wife to the Forest Hill Mining and Manufacturing Co. a right of way was granted from the said Forest Hill tract through the Elk Ridge tract of 500 acres; that since then the said Elk *Hill* tract has been sold under decree of court to enforce payment of a balance of unpaid purchase-money due to said Wm. H. Edwards by the said Wm. K. Smith and bought by the said Edwards; that this proceeding was had during the late war; that a suit is now pending in the circuit court of Kanawha county between your complainant and the said Chewning and Abigail H. Smith, widow of Wm. K. Smith, on the one

side, and the said Wm. H. Edwards, on the other, to set aside the proceedings in and the sale under the decree in said suit as null and void; that if this suit be decided in favor of said Wm. H. Edwards the said John Halsted will doubtless set up a claim against the said Wm. K. Smith's estate and it may be against the said trust fund in the same way as above shown in the case of his failing to recover the aforesaid 100 acres of the Forest Hill tract, and a part of the said trust estate ought to be reserved to meet the contingent liability also; that this right of way is deemed of great value to the Forest Hill tract; that since the last decree entered in the aforesaid suit of Chewning *vs.* your complainant, S. C. Long, and others your orator has been advised that there is doubt as to whether this your honors' court has jurisdiction to enter the decrees aforesaid ordering the said accounts to be taken of his transactions as trustee aforesaid, because the question of the taking of said accounts and of ascertaining the debts chargeable upon said fund and the convening of said creditors before the court for the purpose of distributing the said fund were not put directly in issue in the pleadings in the said cause and because your complainant, the trustee, whose accounts were ordered to be settled, and the creditors whose names are known are residents of the State of Virginia.

573 The plaintiff humbly submits that the facts stated in this bill, in addition to those stated in the aforesaid bill of F. B. Chewning, every one of which, so far as recited in the bill, the plaintiff here reiterates, adopts, and charges to be true, and especially the fact that there is real estate belonging to the trust estate which lies in Fayette Co., West Virginia, which ought to be sold and applied towards the payment of the debts charged upon said trust estate, remove every doubt as to the jurisdiction of this court.

Your orator further alleges that the said trust estate is not sufficient to pay all the debts charged upon it, and that portion of it which remains lying in Fayette county, West Virginia, in the shape of land is wholly inadequate to pay said debts; that the plaintiff, desires the advice and opinion of the court as to how to manage and distribute this trust estate, humbly submits to the consideration of the court the following grounds upon which he asks it: The trust real estate lying in the county of Fayette, West Virginia, ought to be sold, but it is a question of serious doubt as to whether it ought to be sold now or several years hence. If it be sold at once for what it will bring it is almost certain that in the present period of extreme financial stringency it will have to be sold at little more than a nominal price, whereas if the sale be postponed for some years it will probably bring its full value.

2. The creditors provided for as second-class creditors are only described by the general designation as those having debts "acknowledged in writing by the said Smith to be just." Who they are and where they reside is not known to your orator further than that he has come to a knowledge of a number who reside in the State of Virginia, but whether these are all or not and, if not, whether any reside in West Virginia or some other State he does not know, and he needs the aid of the court to convene them

that he may, without personal liability, distribute the fund; at least that part which consists of real estate in Fayette county, West Virginia.

574 Your orator further says that he is advised the court had full and complete jurisdiction over the questions in issue in the aforesaid suit of chancery against Cowan, the plaintiff, and others; that in adjudicating the questions involved in that case it became necessary to direct the payment to the said Cowan of *or* part of the trust fund; that in doing this it was proper to take an account of said trust fund to ascertain whether there was enough to pay said Cowan the amount ascertained to be due him and to order the collection of at least that amount; that accordingly such settlement was ordered and such collection was decreed to be made as were proper to be ordered and decreed to be done; that in this way a part, at least, if not all, of the trust estate was properly brought under the jurisdiction and control of this court; that the creditors of the second class, who were then unknown, were before the court as unknown parties.

And your orator further says that, as he is advised, the settlements which he has already made were properly made under the orders of a court having jurisdiction of the subject.

The plaintiff further says that inasmuch as the court under this bill has jurisdiction of that part of the trust estate which consists of real estate in the county of Fayette, West Virginia, it is proper that this bill and the said cause of Chewning *vs.* Cowan and others should hereafter be heard *to* together or that this bill ought to be heard as a cross-bill in that case; that this court ought to take jurisdiction of the whole trust fund and distribute the same amongst the parties thereto entitled according to their respective rights; that inasmuch as the trust estate is inadequate to pay all the debts charged upon it and these debts are unascertained and can only be ascertained by the aid of the court in chancery, and this court has to ascertain these creditors, the amounts of their respective debts, their priorities, the amount of the trust estate, what has been paid out and to whom, in order to enable it to know how and to whom to distribute the fund under its jurisdiction and control, it is eminently proper that it,

575 sitting as a court of chancery, should distribute this entire trust fund, and especially as the trustee, though a resident of another State, voluntarily submits himself to the jurisdiction of this court and asks its aid in administering the fund, and the balance of the fund which does not consist of real estate lying in the county of Fayette, West Virginia, is the proceeds of the sale of real estate in said county; that no other court has taken jurisdiction of any part of the fund; that — is proper the accounts of the plaintiff as trustee should be settled; that he is willing and desires, in view of the doubts raised in regard to the validity of the settlements already made by him in the case of Chewning *vs.* Cowan, Norris, and others, that the same may be reconsidered and leave given to any party to file exceptions thereto and to take any evidence in reference thereto, and if there are any errors therein that they may be corrected, but if no exceptions be taken to them or no error be found therein, then

let them be ratified and confirmed; but he claims and insists that his said settlements were made and ratified under decrees of a court of competent jurisdiction and are valid and binding. He, however, under the circumstances, agrees that they may be surcharged and falsified if they contain any error, but he insists that they shall be held to be *prima facie* correct; that among the creditors of the said Smith who claim to have debts acknowledged in writing by said Smith to be just the plaintiff has heard of Edwin Carter, Patsy Dillard, the personal representative of Wm. J. Roberts, Jno. Gray, Louisa Hoc, Wm. H. Fitzhugh, ex'or of H. H. Porter; S. C. Jones, —— Emanuel (whose baptismal name is unknown), adm'r of H. Philips, and Geo. Hamilton; that the said Smith, prior to the execution of said trust deeds, had many transactions, some of them quite large, with persons who resided in what is now West Virginia or who now reside in said State and some with parties in Fayette county, but whether any are creditors whose debts are secured by said deeds or who claim to have them so secured the plaintiff does not know, nor does he know of any who have claims, contingent or otherwise, against said fund except those whom he has hereinbefore named. There may be many others in different States.

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Now, forasmuch as your complainant is without adequate relief in the premises save in this honorable court, sitting as a court of chancery, and to the end that S. C. Long, J. W. Norris, P. W. Morris, sheriff, committee adm'r of Wm. K. Smith, dec'd; Gustavus B. Wallace, Edwin Carter, Patsy Dillard, the personal representative of Wm. J. Roberts, whose name is unknown; James Gray, Louisa B. Hoc, Wm. H. Fitzhugh, ex'or of H. H. Porter; —— Emanuel (whose baptismal name is unknown), adm'r of H. Philips; Geo. Hamilton, Forest Hill Mining and Manufacturing Company, John Halsted, F. B. Chewning, in his own right and as adm'r of Abigail H. Smith, and all creditors of Wm. K. Smith whose debts have been acknowledged in writing by said Smith to be just, whose names are unknown, may be made parties defendants to this bill and answer each allegation thereof; that the court may advise and direct the plaintiff how to manage and distribute the aforesaid trust estate in his hands, and particularly whether he ought to sell at once the lands aforesaid in Fayette county or postpone selling them till a more propitious time; that the court may further advise him what debts are included under the designation of "debts acknowledged in writing by Wm. K. Smith to be just;" that the court may convene said creditors and all other persons who have any claim whatever against the said trust estate and ascertain whether such claim is valid and, if valid, the amount thereof and the order of priority in which it ought to be paid; that the aforesaid cause of Chewning *vs.* Cowan, Norris, Long, this plaintiff, and others may be heard together with this bill or this bill treated as a cross-bill filed in said cause; that the court may take charge of the whole trust estate and distribute the same among the parties thereto entitled according to their respective rights; that the court may ascertain the amount of the said trust estate, what has been paid out, and

to whom; that the accounts of your orator as trustee aforesaid may be settled; that the settlement of his accounts as trustee
577 heretofore made in the case of Chewning *vs.* Cowan and others may be referred to a master commissioner of the court, with leave to any party interested to file exceptions thereto and take evidence in reference to the same and to be reconsidered and reformed as may appear to be proper, but if no exception be taken thereto or if no error appear therein to be ratified and confirmed; that all persons who have any claim against the said trust estate may be required to bring forward and establish the same by proper evidence; that the said estate may be distributed according to the rights of the parties entitled to it, and that your honor will grant all such further relief in the premises as may be proper; let a subpœna go, &c.

Exhibits No. 1, 2, 3, 4 referred to in bill:

EXHIBIT No. 1.

At a circuit court continued and held in and for Fayette county, at the court-house thereof, on the 24th day of May, 1871.

F. B. CHEWNING
vs.
JOHN F. COWAN *et als.* } In Ch'y.

This day came the parties, by their counsel, and, by mutual consent, it is ordered, adjudged, and decreed that all matters in dispute in this cause be referred to the arbitrament and award of two gentlemen, one of whom to be selected by the plaintiff and the other by the defendant Cowan and these two to select a third, and the award of the three or a majority of them to be entered up as the decree of the court; the said arbitrators to sit in the city of Washington, D. C., and commence their session on the 22d day of June, 1871. If, from any cause, either of said parties cannot be ready for trial on the day aforesaid he is to telegraph the others in time to prevent a fruitless trip to Washington. With like consent, the entire file of papers may be withdrawn upon leaving certified copies thereof.

And on the same day the following order was made:

578 F. B. CHEWNING
vs.
JNO. F. COWAN *et al.* } In Ch'y.

It appearing to the court that the complainant, F. B. Chewning, is a non-resident of this State, on motion of the defendant Jno. F. Cowan, by counsel, it is ordered that the said F. B. Chewning, or some responsible person for him, shall *shall* within 50 days from this date file an undertaking in this cause as security for the payment of costs in this suit as required by the code of West Virginia, and upon failure to file said undertaking within the said 60 days the suit aforesaid shall be dismissed.

And at another day, to wit, on the 23d day of August, 1871, the following order was made:

F. B. CHEWNING
vs.
JOHN F. COWAN *et als.* } In Ch'y.

By consent of parties, by their attorneys here in court given, it is adjudged and ordered that the order of reference made at the last term of this court in the above suit in chancery be set aside and annulled. The same is continued.

And on another day, to wit, on the 23d day of May, 1872, the following order was made:

Decree.

F. B. CHEWNING
vs.
J. F. COWAN and Others.
JOHN F. COWAN
vs.
SIDNEY C. LONG *et als.* } In Chancery.

By consent of the parties, the second of the foregoing causes is dismissed at the defendants' costs, except an attorney's fee which is not — be taxed, the claims of the plaintiff having been settled, and in the first of said causes, by consent of the parties, it is ordered, adjudged, and decreed that the defendant A. G. Grinnan do
579 settle his trustee accounts before John A. Preston, Esqr., who is hereby appointed a commissioner for that purpose and who is hereby authorized to take, state, and report said account, in which he shall credit the said Grinnan the sum of $8,000.00 paid John F. Cowan and his assignees on the 7th of May, 1872, upon compromise, and notice of the time and place of taking said account, published in a newspaper in the town of Lewisburg for four successive weeks, shall be equivalent to personal service, and he shall report any other special matter deemed material by himself or which may be required by either party, and, W. K. Smith having departed this life and Samuel H. Carrick having been appointed his adm'r by consent of the plaintiff and the said Carrick, this cause is revived against him as such adm'r.

And on another day, to wit, on the 1st day of April, 1873, the following order was made:

Decree.

F. B. CHEWNING
vs.
J. F. COWAN
and
JOHN F. COWAN
vs.
SYDNEY C. LONG *et als.*
} Chancery.

These causes came on to be heard together on the 1st day of April, 1873, upon the papers formerly read and report of John A. Preston, a special commissioner appointed to settle and report the accounts of the trustee, A. G. Grinnan, to which report there is no exception, and was argued by counsel. Upon consideration whereof, and it appearing from said report that on the 15th day of June, 1872, the trust estate held by the said A. G. Grinnan was indebted to the said trustee the sum of $2,832.66 *cents*, it is therefore adjudged, ordered, and decreed that the said A. G. Grinnan recover against said trust estate the debt and interest aforesaid until paid, and the costs expended by him in this suit, with the amount whereof he shall be entitled to a credit of his future settlement as trustee,
580 and, upon the further motion of said A. G. Grinnan, the said John A. Preston, as commissioner as heretofore, is ordered to take and report any subsequent account which may accrue with said trustee. Before taking said accounts he shall fix the time and place of taking the same and have notice of the same served upon the parties in interest, either by personal service or by publication in a newspaper published in the town of Lewisburg for four weeks.

And on another day, to wit, on the 28th day of August, 1873, the following order was made:

F. B. CHEWNING
vs.
JOHN F. COWAN *et al.*
} Chancery.

Upon the motion of A. G. Grinnan, by his counsel, it is ordered, adjudged, and decreed that the order made in this cause at a previous term of the court directing an account to be taken by John A. Preston, special com'r, of the accounts of the said Grinnan, as trustee, be so enlarged as to require said Commissioner Preston to convene all the creditors of the trust fund in the hands of said trustee by publication of the time and place of taking said account and notice to all said creditors to appear and produce their debts duly verified, for six consecutive weeks in the Greenbrier Independent, a newspaper published in the town of Lewisburg, and posted for four weeks at the court-house door of this county, and report the same to court with the evidence on which the same is based.

And on the 31st day of March, 1874, the following order was made:

Decree.

F. B. CHEWNING
vs.
J. F. COWAN and Others. } Ch'y.

This cause came on, this 31st day of March, 1874, to be further heard upon the papers formerly read and report of Commissioner John A. Preston, appointed to settle with A. G. Grinnan, 581 trustee and defendant in the cause, to which report there is no exception filed, and was argued by counsel. Upon consideration whereof it is adjudged, ordered, and decreed that said report be confirmed, and that said Com'r Preston continue to take, state, and report upon the accounts of the said A. G. Grinnan, trustee, from time to time until the trust shall be closed and completed, after convening the parties and creditors by publication in a newspaper published in the town of Lewisburg for four weeks, and at the court-house door of this county, fixing the time and place of taking said account; and it is further adjudged, ordered, and decreed that said trustee, Grinnan, proceed to collect the debts coming to him as such and pay over and satisfy the debts in the first, second, and third class in their order as ascertained in the report of said Com'r Preston, and that he continue to make annual settlements before said com'r until the duties of his trust shall be fully closed.

I, E. H. Easley, clerk of Fayette circuit court, certify that the foregoing is a true copy of all orders made in ch'y suit of F. B. Chewning *vs.* J. F. Cowan and others, as shown from the records of my office.

Given under my hand this 25th of Dec'r, 1877.

E. H. EASLEY, *Cl'k.*

Affidavit of J. L. Marye.

In the Circuit Court of Fayette Co.

A. G. GRINNAN
vs.
S. C. LONG *et als.*

I am well acquainted and have been for 30 years with Dr. A. G. Grinnan, the complainant in the above cause; he lives in Madison county, Virginia. I recently made enquiries of persons in that county well informed as to the extent and value of all the property ostensibly belonging to said Grinnan and situate in that county or in that region of country as to the extent and saleable value of that property. The judgment expressed by these persons was that all

the ostensible property of said Grinnan situate as aforesaid,
582 consisting of about six to 7 hundred acres, with farm stock, furniture, &c., would not sell for over twenty thousand dollars, and that the land would be slow of sale because of the stagnation in the land market. I was further informed by the same persons that a suit was now pending against said Grinnan in Madison Co. to enforce a liability against him for nine thousand dollars arising upon his obligation as obligor in a bond given by certain commissioners of court or other fiduciaries, said Grinnan uniting as surety for them. I am well acquainted in all the counties of Piedmont, Virginia, in which region said Grinnan lives, and if said Grinnan owned any other property of any material value in that region besides that mentioned above I believe I would have heard of it. Being of counsel for certain creditors secured in the deed of trust of Feb'y, 1859, from Wm. K. Smith to said Grinnan, who are entitled, as per report of Com'r Preston, returned March 19th, 1880, in this cause to receive nine-tenths of the trust fund reported in said report as in said Grinnan's hands, I have, in discharge of professional duty, made enquiry recently from persons likely to be informed as to the extent and character of the ostensible property lying in the State of Virginia owned by said Grinnan, and the result has been that I have heard of no property owned by him in the State of Virginia besides the property above described. It is known to myself, as well as to many other people in Virginia, that said Grinnan has been for 30 years past and still is largely engaged in dealing in mineral and other speculative real properties lying in several States. In view of the best information I can get, and my opportunities for information have been favorable, I believe that a personal decree against said Grinnan for the sum of twenty thusand dollars would be slow and difficult of enforcement and recovery, and I believe it to be important to the rights and interests of the said creditors in order to have said fund forthcoming to meet the decrees of this court that said Grinnan be required by an order, now to be entered forthwith, to pay up said fund either to the general receiver of this court or a special receiver, or to invest in
583 U. States bonds (registered) and deposit the latter with the clerk of this court.

JOHN L. MARYE.

Personally appeared before me this 3d April, 1880, John L. Marye, and made oath to the truth of the foregoing statement.

E. H. EASLEY, *Clerk.*

Endorsed: This affidavit of Gov. Marye is excepted to as evidence, it being *ex parte,* and consequently inadmissible. Sam'l Price, for A. G. Grinnan.

And on another day, to wit, at a circuit court continued and held in and for the county of Fayette, at the court-house thereof, on the 5th day of April, 1880.

Decree.

These causes came on to be heard together this 5th day of April, 1880, the first on the papers formerly read and the latter upon the exhibits and report of John A. Preston, special commissioner, with the objections to a hearing upon said report; and the court *without* deciding upon the said objections, it is adjudged, ordered, and decreed that said report be recommitted to said com'r to be acted upon by him and reformed if necessary; that he receive such additional evidence as the parties may lay before him, and that he correct his report accordingly and make report to court. Before taking said accounts he shall give notice of the time and place of taking the same to the plaintiff, Grinnan, and John L. Marye, Esqr., counsel for the creditors; and upon the motion of John L. Marye, in behalf of the creditors, who filed his affidavit in support of his motion, it is adjudged, ordered, and decreed that the plaintiff, Grinnan, be summoned to appear before the court on the first day of the next term, to shew cause, if any he can, why the trust fund found to be in his hands by the said report of Com'r Preston shall not be
584 paid into court; which rule may be served on plaintiff's counsel; and by consent of the parties, by their attorneys, and for reasons appearing to the court, it is ordered that these two causes be removed to the circuit court of Greenbrier county, there to be docketed and proceeded in according to law to a final hearing; and it is further ordered that the aforesaid rule be made returnable to the said circuit court of Greenbrier county instead of this court; and it is ordered that the clerk of this court do transmit the papers of these causes to the clerk of the circuit court of Greenbrier county, with a copy of all orders and decrees made in each, with a taxation of the costs in each.

I, E. H. Easley, clerk of the circuit court of Fayette county, West Virginia, do certify that the foregoing is a true copy of all the orders and decrees entered in the foregoing-entitled causes, with a taxation of the costs in each.

Given under my hand and official seal this 29th April, 1880.

E. H. EASLEY, *Clerk.*

And at another day, to wit, at a circuit court continued and held for the county of Greenbrier on Thursday, the 3d day of June, 1880.

Decree.

CHEWNING & *al.*, Pl'tffs,
vs.
COWAN & *al.*, Defendants,

and

A. G. GRINNAN, Pl'ff,
vs.
LONG & *al.*, Defendants.

These two causes having been transferred from the circuit court of Fayette county to this court for hearing and decision, upon the motion of the counsel for the plaintiffs, it is ordered that they be severally docketed in this court, and upon the motion of A. G. Grinnan, plaintiff in the second of these suits, he has leave to file his petition in these causes, which is accordingly done, and upon
585 the motion of I. N. Tifft he has leave to file his petition in these causes, which is accordingly done, and the causes are continued until the next term of the court.

Commissioner Jno. A. Preston's Report, Filed March 19th, 1880; Recommitted, but Which Is the Basis for the Report Filed Oct. 23d, 1880.

Report of Commissioner Preston.

To the circuit court of Fayette county:

Pursuant to a decree entered on the 4th day of April, 1879, in the above-entitled cause, the undersigned, who was thereby appointed a special commissioner, with instructions to settle the accounts of A. G. Grinnan, trustee, in deed of trust from Wm. K. Smith, to report an account of the fund that should have come into the hands of said trustee and to convene the creditors of the said Smith before him, &c., respectfully submits the following report:

After giving the notice required by said decree by publication in the Fredericksburg News and Fayetteville Enterprise, newspapers published respectively in Fredericksburg, Va., and Fayetteville, W. Va. (copies of said notices and of said decree are herewith filed), your com'r proceeded, at his office, in the town of Lewisburg, W.Va., on the 25th day of June, 1879, to comply with the requirements of said decree, and said proceedings, not having been then and there completed, were continued down to the date above written, when they and this report were closed.

I.

An account of A. G. Grinnan, trustee, with the trust fund.

Your com's'r opened this account upon the 15th day of June, 1873 (being the day to which a former report was conducted, said decree directing your com's'r to base all accounts in this report upon

rep'ts and accounts heretofore made by him and confirmed by said court), and carried it to the 1st day of January, 1879. The trustee was charged with the amount found due by him to the trust
586 fund as of June 15th, 1873, by report of February 3d, 1874, filed in the case of F. B. Chewning *vs.* J. F. Cowan, to wit, $84.01, and all receipts that subsequently came to his hands. The trustee had in his hands when above-mentioned report was closed, as per statement of assets filed with same, land bonds amounting to the sum of $37,350.00, with interest on same from the 1st day of Feb'y, 1872. In this account he has been charged with said sum and interest thereon to times of different payments; also with other sums shown to have been received by him. Your com'r has allowed him credit for all vouchers produced by him and a commission of 10% upon amounts collected for land sales made since last report or that were not taken into said report. No commission has been allowed on the interest collected on the land bonds for $37,350.00, as commission was allowed on said amount in last report, the deed providing for commission on sales.

In statement of assets filed with report of Feb'y, 1874, $1,000 for expenses likely to be incurred was taken from assets, but, as the expense has largely exceeded that amount and as the trustee was not credited with said sum in his account filed with said report, he is not charged with said sum in this account. In making a statement of probable assets said sum was taken into consideration. No credit was ever given this trustee for it; it never entered into his account.

As the result of this account your com'r finds that after paying in full the creditors in the first and second classes named in former report, all expenses allowed, and various sums to creditors in the third class the trustee is indebted to the trust fund as of January 1st, 1879, in the sum of $21,013.24. Vouchers from 1 to 48 filed herewith. (See account marked "A.")

II.

An account of the fund in the hands of the trustee or that should have come to his hands.

As stated above, at the time of the completion of the report of February 3d, 1874, the trustee had in his hands for collection
587 land bonds amounting to the sum of $37,350.00, with interest on same from Feb'y 1st, 1872. At date to which said report was conducted—June 15th, 1873—he was indebted to trust fund in the sum of $84.01. Subsequently he collected various sums for small sales of land made in Fayette county, aggregating about $900. There are, perhaps, other sums still to be collected on small sales made in Fayette county, but your com'r has not definite enough knowledge of these to give the aggregate amount of same. Your com'r has charged trustee with $472.82 more on account of interest on land bonds than trustee reported as collected, but, in opinion of com'r from calculation made by him, trustee should have

collected that sum in addition. As the result of this statement your com'r finds that after paying all expense, the creditors in full in the first and second classes, and the costs of this report there is left to be distributed among the creditors of the 3d class the sum of $37,693.61. (See item III to account "B," herewith filed.)

III.

An account of debts against the trust fund, being debts due from W. K. Smith.

With the report of Feb'y 3d, 1874, above mentioned, an account of debts against the trust fund was returned. In said account the debts were divided into three classes and interest calculated to June 15th, 1873. Your commissioner finds that the trustee has paid in full the debts mentioned in the first and second classes. Your com'r has calculated interest on the 3d class of debts from June 15th, 1873, to March 15th, 1880—that is, on debts allowed in the report of Feb. 3d, 1874. Other debts have been filed before your com'r since this account was opened, and your com'r, being satisfied from statements made by counsel representing the greater part of the debts in this class, and also of the trustee, that said debts are properly entitled to share in the fund, has allowed them. The total amount of debts in this class is $136,770.67, of which $59,109.23 is principal and $77,661.44 is interest. (See account marked "C," filed herewith.)

588

IV.

Statement of *pro rata* share in fund.

At request of counsel for a large majority in interest of creditors your com'r has prepared a statement of the *pro rata* share of each creditor in the fund to be paid to creditors in 3d class.

The total amount of debts in 3d class is $136,770.67, to pay which there is $37,693.61. This sum pays 27.560 per cent. Payments have been made by the trustee of the following amounts to the following parties, to wit: To F. B. Chewning, $12,420.00; to Mrs. A. H. Smith, $5,604.87, and to the executor of John Thorn, $130.00; but as these payments would not have discharged the interest on the debts no difference was made in the calculation. Interest was calculated on principal down to March 15th, 1880, and the parties allowed to participate in the fund according to the am't of their debts as of that date. The amounts they have received, however, must be deducted from the amounts calculation shows their debts entitled to in payments hereafter to be made. (See statement herewith filed marked "D.")

V.

The trustee requested your com'r to report the value to the owners of the Forest Hill tract of the land in controversy in the suit of Halstead *vs.* Buster, now pending in the U. S. district court at

Charleston; also the value of the right of way through Elk Ridge tract to the river to the owners of the Forest Hill tract. T. S. Robson appeared and was examined by your com'r in reference to said matters. He testified that there are 100 acres of land in controversy in the suit of Halsted *vs.* Buster. This land is situated about one mile back from the river and has several veins of coal on it, and in the opinion of the witness was worth $30.00 per acre. This would make the tract worth $3,000. Same witness testified as to the value of right of way through Elk Ridge tract to the owners of the Forest Hill tract. The trustee claims that when he sold to the Forest
589 Hill Company he sold them the right of way through Elk Ridge tract, which he then owned, to Armstrong creek, and thence to the river. Another party has set up claim to Elk Ridge tract, and a suit is now pending to settle the ownership to said land. Should said suit be decided against the interests of the trustee the Forest Hill owners would lose the right of way above mentioned, and would be entitled to damage from trustee, the trustee having warranted title. This is about the substance of trustee's statement.

From the deposition of said Robson it appears that the value of the Forest Hill tract consists in its timber and coal, and that these cannot be marketed without passing over the Elk Ridge tract to Armstrong creek and thence to the R. R. and river; but he is unable to put any value upon said right of way to the owners of the Forest Hill tract. (See deposition of said Robson herewith filed.) From the testimony your com'r is not able to fix any amount as the damage said owners will sustain by the loss of said right of way. The vouchers furnished by the trustee are also filed with this report, numbered from — to —; also deposition of Thos. S. Robson.

All of which is respectfully submitted.

JOHN A. PRESTON,
Special Commissioner.

Report completed March 10th, 1880.

JNO. A. PRESTON,
Special Com'r.

Copy of Account "A" of Com'r Preston's Report.

A. G. Grinnan, trustee under agreement (dated Feb. 10th, 1859) with Wm. K. Smith, in acc't with the trust fund.

DR.

		Principal.	Interest.
1873.			
June 15.	To amount found due trust fund by A. G. Grinnan as per report of this date	84 01	
590	To balance	351 86	
		435 87	

CR.

1873.			
Aug.	—.	By cash, expense to Balto. to settle with Long and Norris (vo. 1)	7 00
Sept.	—.	By cash, expense to West Va. (vo. 2)	31 45
Sept.	—.	By cash, expense to Balto. (vo. 3)	20 00
Sept.	10.	By cash to Blakely and Robinson (vo. 4)	100 00
Nov.	26.	By cash, Marye and Fitzhugh, att'ys for Chewning (vo. 5)	200 00
Dec.	5.	By cash, expense to Lewisburg, W. Va. (vo. 6)	18 55
1874.			
Jan'y	1.	By cash, taxes for 1872 (vo. 7)	12 29
Jan'y	1.	By cash, com'r's rev. for transferring of lands (vo. 8)	1 50
Jan'y	1.	By cash, taxes on Loup Creek and Armstrong Cr. lands (vo. 9 and 10)	18 08
Jan'y	1.	By cash, comm's for transferring land (vo. 11)	75
Mar.	27.	By cash, expense to Balto. to see Long and Norris (vo. 12)	26 25
			435 87

DR.

1874.			
July 591	29.	To am't paid by Mr. Long in payments and acceptances since Feb'y 19th, '74, on interest on bonds	2,570 41
		To am't by Mr. Long in Balto.	20 00
Sept.	16.	To am't rec'd of G. M. Blume for G. McKinney on sales of land	119 56
1875.			
Jan'y	8.	To am't cash for land bond due July, 1873 (including interest)	13,141 80
Mar.	—.	To am't rec'd of G. M. Blume on acc't of collection from Kincaid on land purchase	300 00
			16,151 77

CR.

1874.			
June	15.	By balance as *per contra*	351 86
July	21.	" expense to Baltimore to see Long and Norris (vo. 13)	25 00
Aug.	11.	By cash, John A. Preston, com'r, making acc't (vo. 14)	28 25
Nov.	5.	By clerk U. S. court for copy (vouch. 15)	2 00
Nov.	9.	By cash, expenses to West Va. (vouch. 16)	39 93

Nov.	17.	By cash, expenses to Balto. (vouch. 17)	19 50
Dec. and Jan'y.		By cash, expenses to Balto. (vo. 18 and 19)	38 50
1875.			
Jan'y	—.	By cash paid Barton and Wilmer, atto's (vouch. 20)	301 75
592		By cash, tax on Loup Cr. land, 1874 (vouch. 21)	11 60
		By cash, tax on Armstrong Cr. lands (vouch. 22)	1 81
Jan'y	15.	By cash paid Marye and Fitzhugh, atto's for A. H. Smith (vouch. 23)	2,000 00
Jan'y	—.	By cash paid same, atto's for F. B. Chewning (vouch. 24)	3,000 00
Jan'y	—.	By cash paid G. B. Wallace, balance on bond (vouch. 25)	3,700 28
Jan'y	—.	By cash, expenses to Balto. and Fredericksburg (vouch. 26)	22 25
Jan'y	18.	By cash paid Blakely, Crow and Corell for posting and pub. notices (vouch. 28 and 29)	19 75
		By amount to balance	6,589 29
			16,151 77

Dr.

1875.			
June	15.	To balance as *per contra*, last page	6,589 29
1876.			
Jan'y	3.	To cash of J. G. Reading for land bond	11,175 00
		To cash, interest at same time on same	2,631 70
			20,390 99

Cr.

1875.			
Aug.	11.	By cash, Sam'l Price, atto's fee (vouch. 30)	100 00
		By cash, Easley, clerk's fee (31)	1 12
593			
1876.			
Jan'y	12.	By cash, expense to New York, Fred'b'g, and Richmond (32)	58 16
Jan'y	12.	By cash p'd Marye & Fitzhugh, atto. for A. H. Smith (33)	3,500 00
Jan'y	12.	By cash p'd same, atto. for Chewning (34)	3,500 00
Jan'y	19.	By cash p'd Jas. H. Nash, atto. fee (35)	20 00

Jan'y	21.	By cash, expenses to Fayette C. H. and Charleston (36)	30 60
Jan'y	22.	By cash p'd ex'ors of John Thorn (37)	130 00
Jan'y	—.	By cash p'd G. M. Blume (38)	18 73
Mar.	—.	By cash, tax on Loup Creek and Armstrong lands (39 and 40)	13 87
		By cash to am't to balance	13,023 51
			20,395 99

Dr.

1876.			
June	15.	To balance as *per contra*	13,023 51
Sept.	12.	To am't collected, thro' Blume, of J. G. McKinney, on land bonds	52 00
		By am't, by Blume, of Kincaid, for sale of lands in 1875	100 00
1877.			
Jan'y	—.	To am't of J. G. Reading in full of 3 bonds of $5,000 each, bal. and interest	16,323 34
Jan'y	—.	To am't collected by Robson on sales of small tracts of Loup Creek lands	400 00
			29,898 85

594

Cr.

1876.			
1887.			
Jan'y	—.	By am't paid A. G. Grinnan, trustee of A. H. Smith (vo. 41)	746 66
Jan'y	—.	By cash for preparing and acknowledging deed of release to Long (42)	6 00
Jan.	—.	By expense to Phila. and New Y. to collect and settle with Halsted (43)	97 00
Jan.	12.	By cash p'd A. K. Blakely (44)	14 55
Jan.	12.	By cash p'd S. Robson (45)	770 00
Jan.	23.	" " " Mrs. A. H. Smith (46)	2,100 00
Jan.	23.	By cash p'd F. B. Chewning (46½)	4,000 00
Feb.	—.	By cash, tax on 108 acres of land, Loup Cr. (47)	4 32
Feb.	—.	By cash, tax on Armstrong Cr. lands (48)	2 50
		By am't to balance	22,157 82
			29,898 85

Dr.

1877.			
June	—.	To balance as *per contra*	22,157 82
			22,157 82

595 CR.

1877.			
Dec'r	—.	By expense to Ch'ville to see Blakely (vo. 49)	9 43
Dec'r	—.	By cash paid F. B. Chewning, distribution (50)	300 00
1878.			
Feb.	—.	By cash paid Mrs. A. H. Smith's trustee (51)	1,050 00
Apr.	—.	By cash paid A. R. Blakely, atto's fee, amended bill (52)	100 00
		By cash, sundry expense bill (53)	12 75
		By am't to balance	20,685 64
			22,157 82

DR.

1878.			
June	15.	To balance as *per contra*	20,685 64

1878. CR.
1879.

Jan'y	—.	By tax on Loup Cr. lands for 1877 (vo. 54)	6 02
		By tax on Loup Cr. lands for 1878 (vo. 55)	6 90
		By tax on ½ Armstrong Cr. lands (56)	2 93
		By Blume's bill rendered in 1875 and omitted (57)	30 97
		By R. S. Chew, cl'k, Frdsbg. (58)	1 25
596		By commission due A. G. Grinnan on am'ts collected on lands sold in Fayette on which no com's'n has been allowed, am't col. $971.56 @ 10%	97 15
		To am't to balance	20,540 42
			20,685 64

DR.

1879.			
Jan'y	1.	To balance as *per contra*	20,540 42
		To this must be added $472.82, am't of interest on bonds collected which trustee should ha-e collected, but which he seems not to have collected	472 82
		Total am't due by trustee	$21,013 24

JOHN A. PRESTON,
Spec'l Com'r.

Copy of Account "B" Filed with Special Com'r John A. Preston's Report.

Account B.

Statement showing payments made by trustee, A. G. Grinnan, to creditors in 1st and 2d classes; also expense in order to ascertain am't to be distributed among creditors of 3d class.

Expense.

1873.				
Aug.	—.	By cash, vouch. No. 1 to acc't I--	7 00	
Sept.	6.	By cash, vouch. No. 2 to acc't I--	31 45	
Sept.	6.	By cash, vouch. No. 3 to acc't I--	20 00	
Sept.	10.	By cash, vouch. No. 4 to acc't I--	100 00	
597				
Dec'r	5.	By cash, vouch. No. 6 to acc't I--	18 55	
1874.				
Jan'y	1.	By cash, vouch. No. 7 to acc't I--	12 29	
Jan'y	—.	By cash, vouch. No. 8 to acc't I--	1 50	
Jan'y	—.	By cash, vouch. No. 9 and 10 to acc't I----------	18 08	
Jan'y	—.	By cash, vouch. No. 11 to acc't I--	75	
Mar.	27.	By cash, vouch. No. 12 to acc't I--	26 25	
				235 87
1874.				
July	2.	By cash, vouch. No. 13 to acc't I--	25 00	
Aug.	1.	By cash, vouch. No. 14 to acc't I--	28 25	
Nov.	5.	By cash, vouch. No. 15 to acc't I--	2 00	
Nov.	9.	By cash, vouch. No. 16 to acc't I--	39 93	
Nov.	17.	By cash, vouch. No. 17 to acc't I--	19 50	
Dec. and Jan'y.		By cash, vouch. No. 18 and 19 to acc't I----------	38 50	
1875.				
Jan'y	—.	By cash, vouch. No. 20 to acc't I--	301 75	
		By cash, vouch. No. 21 to acc't I--	11 60	
		By cash, vouch. No. 22 to acc't I--	1 81	
		By cash, vouch. No. 26 to acc't I--	22 25	
		By cash, vouch. No. 28 and 29 to acc't I----------	19 75	
				510 34
598				
1875.				
Aug.	10.	By cash, vouch. No. 30 to acc't I--	100 00	
		By cash, vouch. No. 31 to acc't I--	1 12	
1876.				
Jan'y	12.	By cash, vouch. No. 32 to acc't I--	58 16	
Jan'y	19.	By cash, vouch. No. 35 to acc't I--	20 00	

Jan'y	21.	By cash, vouch. No. 36 to acc't I	30 60	
		By cash, vouch. No. 38 to acc't I	18 73	
Mar.	—.	By cash, vouch. No. 39 and 40 to acc't I	13 87	
				242 48
1876.				
1877.				
Jan'y	—.	By cash, vouch. No. 42 to acc't I	6 00	
		By cash, vouch. No. 43 to acc't I	97 00	
Jan'y	12.	By cash, vouch. No. 44 to acc't I	14 55	
Jan'y	12.	By cash, vouch. No. 45 to acc't I	770 00	
		By cash, vouch. No. 47 to acc't I	4 32	
Feb.	—.	By cash, vouch. No. 48 to acc't I	2 50	
				894 37
1877.				
Dec.	—.	By cash, vouch. No. 49 to acc't I	9 43	
1878.				
Apr.	—.	By cash, vouch. No. 52 to acc't I	100 00	
599		By cash, vouch. No. 53 to acc't I	12 75	
				122 18
1878.				
Jan'y	*79.*	By cash, vouch. No. 54 to acc't I	6 02	
		By cash, vouch. No. 55 to acc't I	6 90	
		By cash, vouch. No. 56 to acc't I	2 93	
		By cash, vouch. No. 57 to acc't I	30 97	
		By cash, vouch. No. 58 to acc't I	1 25	
		Commissions to A. G. G., $971.56, @ 10 %	97 15	
				145 22
		Total expense		$2,150 46
		Amount paid creditors of first class:		
1875.				
Jan'y	15.	Am't p'd G. B. Wallace in full		3,700 28
		Am't paid creditors, second class:		
		Amount allowed Mrs. A. H. Smith by last report, which was confirmed by Fayette cir. court	3,365 75	
		Int. from June 15th, '73 (date of report), to Jan'y 15th, '75	324 22	
			3,689 97	
		Cr. Jan'y 15th, 1875	2,000 00	2,000 00
		Carried over	$1,689 97	$7,850 74

600	Am't bro't forward		$1,689 97	$7,850 74
	Int. on $1,689.97 from Jan'y 15, '75, to Jan'y 12th, '76		101 82	
	Credit Jan'y 12, '76, in full		1,791 79	1,791 79
	Total expense bill and payment of first and second class			$9,642 53

III.

Receipts by trustee:

1873.			
June 15.	Am't found due the trust fund by report of this date	84 01	
1874.			
July 29.	Am't rec'd of Mr. Long (on interest)	2,570 41	
	Am't rec'd of Mr. Long in Balto.	20 00	
Sept. 16.	Am't rec'd of G. M. Blume for McKinney land	119 56	
1875.			
Jan'y 8.	Am't rec'd on land bond due July, 1873	13,141 80	
Mar. —.	Am't rec'd of G. M. Blume for Kincaid on lands	300 00	
1876.			
Jan'y 3.	Am't rec'd of J. G. Reading for land bond	11,175 00	
	Am't rec'd of J. G. Reading on interest	2,631 70	
Sept. 12.	Am't rec'd of G. M. Blume on McKinney land sales	52 00	
	Am't rec'd of G. M. Blume on Kincaid land sales	100 00	
1877.			
Jan'y 1.	Am't rec'd of J. G. Reading in full of 3 bonds, $5,000 each	16,323 34	
601	Am't rec'd of Robson on sales of small tracts	400 00	
		46,917 82	
	Add interest that should have been collected	472 82	
		47,390 64	
	Total expense bill and payment of 1st and 2d class creditors	9,642 53	
			37,748 11

Costs of taking this account:

Greenbrier Independent, pub. notice, Feb. 10th, 1879	5 00	
Fredericksburg News, May 15th, 1879	7 50	
Fayetteville Enterprise, May 15th, 1879	7 50	
Thos. L. Robson, 1 day's attendance before com'rs to give deposition and ninety miles travel	10 50	
Constable serving notice on Robson	75	
Com's'r making out this report, thirty hours, @ 75 per hour	23 25	
		54 50
Am't to be apportioned between creditors of 3d class		$37,693 61
Total am't of debts in 3d class	136,770 67	
Total am't to pay debts in 3d class	$37,693 61	

602 Amount of per cent. on the dollar, 27.560.

JOHN A. PRESTON,
Spec'l Com's'r.

Copy of Account "C" Accompanying Commissioner Preston's Report.

Account C.

An account of claims against the trust fund in the hands of A. G. Grinnan, trustee, under agreement with W. K. Smith.

1st class.

Debt of G. B. Wallace and interest to January 15, 1875 $3,700 28
Paid in full Jan'y 15, 1875.

2d class.

Mrs. A. H. Smith, 10 per cent. on net am't of sales ascertained by report, Feb'y 4th, 1874, and confirmed by cir. c't Fayette county, at $3,365.75, with interest from June 15, 1873, am't'd when paid to $3,791 79
Paid in full.

3d class.

	Principal.	Interest.
1. Amount of debt of F. B. Chewning, as per report of Feb'y 3d, 1874	23,897 23	
Interest on same to June 15, 1873	------	19,237 27
Int. on prin. of same from June 15, 1873, to March 15, 1880	------	10,036 83
2. Am't of debt to Mrs. A. H. Smith for relinquishment of dower secured in trust deed, same report	25,000 00	
Interest on same to June 15th, 1873	------	21,528 83

	Interest on prin. from June 15, 1873, to March 15, 1880	------	10,500 00
3.	F. B. Chewning, assignee of judgment in favor of John H. Roberts, same report	3,697 71	
603	Interest to June 15, 1873, same report	------	3,540 55
	Cost on same	8 63	
	Int. on prin. from June 15, 1873, to Mar. 15, 1880	------	1,553 03
4.	F. B. Chewning, assignee of judgment in favor of Sarah F. Rose, same report	135 00	
	Interest to June 15, 1873, same report	------	202 16
	Cost on same	8 50	
	Int. on prin. from June 15, '73, to Mar. 15, 1880	------	56 70
5.	F. B. Chewning, assignee of judg't in favor of same, same report	113 00	
	Interest on same to June 15, 1873, same report	------	165 82
	Costs on same	9 75	
	Int. on prin. from June 15, '73, to March 15, 1880	------	47 46
6.	F. B. Chewning, assignee of judg't in favor of W. H. Fitzhugh's executor, same report	526 00	
	Int. on same to June 15, 1873, same report	------	803 46
	Cost on same	6 46	
	Int. on prin. from June 15, '73, to March 15, 1880	------	220 92
7.	F. B. Chewning, assignee of judg't in favor of same as last above, same report	71 17	
	Interest to June 15th, 1873	------	111 02
	Int. on prin. from June 15th, '73, to Mar. 15, '80	------	29 89
8.	Judg't in favor of executors of John Thorn, now for benefit of A. G. Grinnan, same report	122 46	
604	Interest on same to June 15th, 1873, same report	------	194 42
	Costs on same report	7 16	
	Int. on principal from June 15th, '73, to Mar. 15, '80	------	51 43
9.	Judg't for same as above, now for benefit as last above	405 00	
	Int. to June 15th, 1873, same report	------	624 70
	Costs on same	7 16	
	Int. on prin. from June 15th, '73, to Mar. 15, 1880	------	170 10

10. B. F. Chewning, assignee of bond to Orel Buck, same report	162 97	
Int. on same to June 15, 1873	------	243 64
Int. on prin. from June 15, '73, to March 15th, 1880	------	68 44
11. F. B. Chewning, assignee of bond of Jackson Lesson, same report	50 00	
Int. to June 15th, 1873, same report	------	79 32
Int. on prin. from June 15th, '73, to March 15, 1880	------	21 00
12. Judgment cir. court of Spottsylvania county in favor of ex'or of John C. Gordon and assigned to F. B. Chewning (vouch. No. 1)	1,400 00	
Interest on same from Oct. 7th, 1847, to March 15, 1880	------	2,723 00
Costs on same	6 97	
13. Bond due by W. K. Smith to Charles C. Welfare, dated and due March 20, 1858, assigned to F. B. Chewning (vo. No. 2)	1,577 45	
Int. on same from March 16th, 1858, to Mar. 15, 1880	------	2,082 23
14. Bond due by W. K. Smith to Dan'l G. Reynolds, dated and due Jan'y 8th, 1848, assigned to F. B. Chewning (vouch. 3)	461 03	
605 Int. on same from Jan'y 8th, 1848, to Mar. 15th, 1880	------	889 78
15. Judgment circuit court Spottsylvania Co. in favor of Thomas L. Catlett *vs.* W. K. Smith, May 23d, 1848 (vo. 4)	123 00	
Int. on same Jan'y 1st, 1848, to Mar. 15th, 1880	------	237 69
Costs of suit	6 79	
16. Bond of W. K. Smith to Samuel Phillips & Son, dated and due Jan'y 5th, 1848 (vouch. 5)	145 95	
Int. on same from Jan'y 5th, 1848, to March 15th, 1880	------	281 68
18. Judgment of Stafford county c't in favor of Hannah H. Colter *vs.* W. K. Smith, now in favor of W. H. Fitzhugh's executor (vouch. 7)	67 88	
Int. on same from Dec. 23d, 1847, to March 15th, 1880	------	131 33
Cost on same	5 83	
17. Bond of W. K. Smith to George Hamilton, Jr., dated and due Jan. 1st, 1848 (vouch. 6)	68 00	
Int. on same from Jan'y 1st, 1848, to March 15th, 1880	------	131 41

19. Bond of W. K. Smith to Thomas Manuel, due Feb'y 1st, 1847, after credits off (vo. 8)	477 40	
Int. to Mar. 15th, 1880	------	661 73
20. Bond of W. K. Smith to same, dated Feb'y 1st, '47, vo. 9 (these two are now for the benefit of A. G. Grinnan)	540 73	
Int. from Jan'y 17th, 1848, to March 15th, 1880	------	1,043 60
Principal	59,109 23	77,661 44
Int.	77,661 44	
Total amount of debts in 3d class	$136,770 67	

606 Statement "D" of this report is not inserted, as a similar statement, with calculation somewhat varied, is made in last report. (See statement "G" of next report.)

Report of Com's'r John A. Preston, Filed October 23d, 1880.

Commissioner Preston's report.

To the circuit court of Greenbrier county:

Pursuant to a decree entered on the 5th day of April, 1880, by the circuit court of Fayette county in the above-entitled cause the undersigned com's'r, to whom a report made to the March term, 1880, of said court in said cause was recommitted with instructions to reform the same, if necessary, according to any evidence that the parties might lay before him, &c., respectfully submits the following report:

After giving the notice required by said decree (copies of said decree and notice are hereby filed) your com's'r proceeded at his office, in the town of Lewisburg, on the 15th day of September, 1880, to comply with the requirements of said decree, and said proceedings, not being then and there completed, were continued down to the date above written, when they and this report were closed.

Your com's'r would report that there has been no additional evidence filed before your com's'r except in the shape of exhibits to certain petitions filed, one by Dr. A. G. Grinnan and one by J. N. Tifft, setting up certain claims. The matters set up in said petitions being of a very intricate nature and raising questions of law that will have to be decided by the court, your com's'r has not acted upon them, but refers them to the court. Should the claims set up be allowed another calculation will have to be made as to the distribution share of each creditor. This calculation will take but a short time.

1st. Your com's'r has made an additional statement of account between the trustee and the trust fund, bringing the said ac-
607 count down to Oct. 1st, 1880. As the result of this statement the trustee was found indebted to the trust fund as of Oct.

1st, 1880, in the sum of $20,922.42. (See statement marked "H," herewith filed.) Your com's'r would report, however, that in said account said trustee was not allowed commission on interest collected by him for the reasons stated in report of March, 1880. Should the court allow the trustee commission on interest collected by him, then said sum will have to be reduced by $898.79, being the commission @ 10 % on $8,987.97, amount of interest collected, and said trustee will only be indebted $20,922.42, less commission on interest collected, $898.79, equal $20,033.63.

2d. The fund in hands of trustee for distribution.

An additional statement has been made, showing the am't in hands of trustee applicable to the payment of debts in 3d class. The trustee in this statement is charged with amount found in his hands for distribution by report of March, 1880, and amounts he has collected and reported since, and credited with necessary expenses. As the result of this statement your com's'r finds that there is applicable to the payment of said class of debts the sum of $37,652.29. (See statement II to statement "H.") Should the trustee be allowed by the court commission on interest collected, then said sum of $37,652.29 for distribution will have to be reduced the amount of $898.79, commission on interest collected, leaving $36,753.50 to be distributed among said creditors.

3d. Statement of *pro rata* share in fund.

Your com's'r has prepared a statement of the *pro rata* share of each creditor in the fund. Two additional claims have been filed and allowed, one a judgment of corporation court of Fredericksburg in favor of Patsy Dillard for $60.00 and costs and interest, the other a bond for $60.00 in favor of Edwin Carter. The total amount of indebtedness (3d class) is $137,128.07, to pay which there is $27,652.26. This sum pays 27.457 on the $1. As stated in report of March, 1880, payments have been made by the trustee of the following amounts at various times to the following parties,
608 to wit: To F. B. Chewning, $12,420.00; to Mrs. A. H. Smith, $5,604.87, and to the ex'ors of John Thorn, $130.00, but as these payments would not have discharged the interest on the debts when made no difference was made in the calculation. Interest was calculated on principal down to March 15th, 1880, and the parties allowed to participate in the fund according to am't of their debts of that date. The amounts they have received, however, must be deducted from the *pro rata* share their debts — entitled to as per the statement made. (See statement herewith filed, marked "G.") If court allows trustee commission on interest collected your com's'r has made a statement showing the *pro rata* share of each creditor. (See 2d page of statement G.)

IV. The trustee claims that at least $5,000.00 should be left in his hands to indemnify him for breach of warranty likely to arise in reference to several tracts and loss of right of way through Elk Ridge tract. Several suits are in progress which involve the title

to parts of the land deeded by Smith to Grinnan, but as these matters are set up in the petition above referred to and as there is not sufficient proof before your com's'r to enable him to form an opinion as to the damage that will be sustained by the trustee no estimate is here attempted.

All of which is respectfully submitted.

JOHN A. PRESTON, *Com's'r.*

Report completed Oct. 16th, 1880.

JOHN A. PRESTON, *Com's'r.*

Copy of Account "H" Filed with Report of Com's'r Preston, as Above Referred to.

Account H.

A. G. Grinnan, trustee under agreement (dated Feb. 10th, 1859) with Wm. K. Smith, in acc't with trust fund.

DR.

		Principal.	Interest.
1879.			
Jan. 1.	To am't due as per last settlement of account	$21,013	24
609			
1880.	To am't received of Thos. S. Robson for lands sold to Anderson	50	00
		21,063	24

CR.

1879.	By am't paid G. M. Blume, omitted in last account (vouch. No. 58 to last acc't)	40	07
1880.			
Sept. —.	By cash paid to clerk of U. S. dist. c't at Charleston for copy and survey (vo. No. 1)	5	25
	By cash, expense to Lewisburg and Fayette on trust business (vouch. 2)	36	00
	By cash p'd John A. Preston, com'r, in full for costs of account of March, 1880	54	50
	By cash, commission on am't collected, viz., $50 @ 10%	5	00
	By cash, am't to balance	20,922	42
		21,063	24

1st, 1880, in the sum of $20,922.42. (See statement marked "H," herewith filed.) Your com's'r would report, however, that in said account said trustee was not allowed commission on interest collected by him for the reasons stated in report of March, 1880. Should the court allow the trustee commission on interest collected by him, then said sum will have to be reduced by $898.79, being the commission @ 10 % on $8,987.97, amount of interest collected, and said trustee will only be indebted $20,922.42, less commission on interest collected, $898.79, equal $20,033.63.

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An additional statement has been made, showing the am't in hands of trustee applicable to the payment of debts in 3d class. The trustee in this statement is charged with amount found in his hands for distribution by report of March, 1880, and amounts he has collected and reported since, and credited with necessary expenses. As the result of this statement your com's'r finds that there is applicable to the payment of said class of debts the sum of $37,652.29. (See statement II to statement "H.") Should the trustee be allowed by the court commission on interest collected, then said sum of $37,652.29 for distribution will have to be reduced the amount of $898.79, commission on interest collected, leaving $36,753.50 to be distributed among said creditors.

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608 to wit: To F. B. Chewning, $12,420.00; to Mrs. A. H. Smith, $5,604.87, and to the ex'ors of John Thorn, $130.00, but as these payments would not have discharged the interest on the debts when made no difference was made in the calculation. Interest was calculated on principal down to March 15th, 1880, and the parties allowed to participate in the fund according to am't of their debts of that date. The amounts they have received, however, must be deducted from the *pro rata* share their debts — entitled to as per the statement made. (See statement herewith filed, marked "G.") If court allows trustee commission on interest collected your com's'r has made a statement showing the *pro rata* share of each creditor. (See 2d page of statement G.)

IV. The trustee claims that at least $5,000.00 should be left in his hands to indemnify him for breach of warranty likely to arise in reference to several tracts and loss of right of way through Elk Ridge tract. Several suits are in progress which involve the title

to parts of the land deeded by Smith to Grinnan, but as these matters are set up in the petition above referred to and as there is not sufficient proof before your com's'r to enable him to form an opinion as to the damage that will be sustained by the trustee no estimate is here attempted.

All of which is respectfully submitted.

JOHN A. PRESTON, *Com's'r.*

Report completed Oct. 16th, 1880.

JOHN A. PRESTON, *Com's'r.*

Copy of Account "H" Filed with Report of Com's'r Preston, as Above Referred to.

Account H.

A. G. Grinnan, trustee under agreement (dated Feb. 10th, 1859) with Wm. K. Smith, in acc't with trust fund.

DR.

		Principal.	Interest.
1879.			
Jan. 1.	To am't due as per last settlement of account	$21,013	24
609			
1880.	To am't received of Thos. S. Robson for lands sold to Anderson	50	00
		21,063	24

CR.

1879.	By am't paid G. M. Blume, omitted in last account (vouch. No. 58 to last acc't)	40	07
1880.			
Sept. —.	By cash paid to clerk of U. S. dist. c't at Charleston for copy and survey (vo. No. 1)	5	25
	By cash, expense to Lewisburg and Fayette on trust business (vouch. 2)	36	00
	By cash p'd John A. Preston, com'r, in full for costs of account of March, 1880	54	50
	By cash, commission on am't collected, viz., $50 @ 10%	5	00
	By cash, am't to balance	20,922	42
		21,063	24

CR.

1880.

Oct. 1. To bal. as *per contra* 20,922 42

Above amount due by trustee to trust fund as of Oct. 1st, 1880.

JOHN A. PRESTON, *Com'r.*

II.

Found in hands of trustee, receipts by trustee:

Am't with which charged, as per last statement, March, '80			$37,693 61
610 Am't collected since, as per above			50 00
			$37,743 61
To deduct disbursements:			37,743 61
Expense acc't, as *per contra* above, less item of	$54 50		
Allowed in last account	86 32		
Com'r making out this report	5 00		
			91 32
To be distributed			$37,652 29

Should the court decide to allow the trustee commission on interest collected by him, then the said sum of $37,652.29 will have to be reduced that much.

Amount of interest collected by trustee, $8,987.97; commission on same @ 10%	898 78
To be distributed per this statement	$36,753 50

Copy of Statement "G" Referred to and Filed with Com'r John A. Preston's Report of October, 1880.

611 Account G.

(Page 1.)

List of Debts of W. K. Smith Calculated to March 15th, 1880, *and Pro Rata Share of Each.*

(Rate per cent., 27.457.)

3d class.

	Principal.	Interest.	Total.	Am't to pay.
No. 1. F. B. Chewning, secured in trust deed *	23,897 23	29,274 40	53,171 33	14,598 25
No. 2. Mrs. A. H. Smith, secured in trust deed	25,000 00	32,020 83	57,020 83	15,658 30
No. 3. F. B. Chewning, assignee of J. H. Roberts	3,697 71	5,102 21	8,799 92	2,416 18
No. 4. F. B. Chewning, assignee of Sarah F. Rose	135 00	267 36	402 36	110 47
No. 5. F. B. Chewning, assignee of Sarah F. Rose	113 00	223 03	336 03	92 26
No. 6. F. B. Chewning, assignee of W. H. Fitzhugh's ex't'rs	526 00	1,030 84	1,556 84	427 46
No. 7. F. B. Chewning, assignee of W. H. Fitzhugh's ex't'rs	71 17	140 91	212 08	58 23
No. 8. A. G. Grinnan, assignee John Thorn's ex't'r	122 46	253 01	375 47	103 09
No. 9. A. G. Grinnan, assignee John Thorn's ex't'r†	405 00	801 96	1,206 96	331 39
No. 10. F. B. Chewning, assignee, bond to Orel Buck	162 97	312 08	475 05	130 43
No. 11. F. B. Chewning, assignee, bond to Jackson Sisson	50 00	100 32	150 32	41 27
No. 12. F. B. Chewning, judg't Jno. Gordon's ex'or	1,400 00	2,729 97	4,179 97	1,133 96
No. 13. F. B. Chewning, assignee, bond C. C. Wilford	1,577 45	2,082 23	3,659 68	1,004 84
No. 14. F. B. Chewning, assignee, bond Dan'l G. Reynolds	461 03	889 79	1,350 81	370 89
No. 15. Thos. C. Catlett, judg't	123 00	244 48	367 48	100 88
No. 16. Sam'l Phillips & Son, on bond	145 95	281 68	427 63	117 41
No. 17. George Hamilton, Jr., bond	68 00	131 41	199 41	54 75
612 No. 18. W. H. Fitzhugh's ex'or, assignee, judg't H. H. Coalter	67 88	137 16	205 04	56 31
No. 19. A. G. Grinnan, assignee, bond of Thos. Manuel	477 40	661 73	1,139 13	312 77
No. 20. A. G. Grinnan, assignee, bond of Thos. Manuel	540 73	1,043 60	1,584 33	435 00
No. 21. Patsy Dillard, judg't, $60; cost, $5.20	65 20	116 10	181 30	49 77
No. 22. Edwin Carter, bond	60 00	116 10	176 10	48 35
Totals			137,128 07	37,652 26

*Am't of debt No. 1 above	14,598 23	
1. On debt No. 1 there has been paid heretofore	13,420 00	
(See statement "D" to report of Mar., 1880.)		
Balance due on said debt	2,178 22	
*Am't of debt No. 2 above		15,658 30
On said debt there has been paid heretofore (see statement "D" to report of Mar., 1880)		5,604 82
Bal. due on said debts		$10,053 48
†Am't of debt No. 9 above	$331 39	
On said debt there has been p'd, as per statement "D," report Mar., 1880	130 00	
Bal. due on said debt	$201 39	

613 (Page 2 to statement "G.")

List of Debts of W. K. Smith Calculated to March 15th, 1880, and Pro Rata Share of Each.

(Rate per cent., 26.802.)

3d class.

		Principal.	Interest.	Total.	Am't to pay.
No. 1.	F. B. Chewning, secured in trust deed*	$23,897 23	29,274 10	53,171 33	$14,250 98
" 2.	Mrs. A. H. Smith, secured in trust deed	25,000 00	32,020 83	57,020 83	15,280 72
" 3.	For names see first page.	3,697 71	5,102 21	8,799 92	2,358 55
" 4.		135 00	267 36	402 36	107 84
" 5.		113 00	223 03	336 03	90 06
" 6.		526 00	1,030 84	1,556 84	417 26
" 7.		71 17	140 91	212 08	56 84
" 8.		122 46	253 01	375 47	100 62
" 9.†		405 00	801 96	1,206 96	323 48
" 10.		162 97	312 08	475 05	127 32
" 11.		50 00	100 32	150 32	40 29
" 12.		1,400 00	2,729 97	4,129 97	1,106 91
" 13.		1,577 45	2,082 23	3,659 68	980 86
" 14.		461 03	889 78	1,350 81	362 04
" 15.		123 00	244 48	367 48	98 49
" 16.		145 95	281 68	427 63	114 61
" 17.		68 00	131 41	199 41	53 44
" 18.		67 88	137 16	205 04	54 95
" 19.		477 40	661 73	1,139 13	305 21
" 20.		540 73	1,043 60	1,584 33	424 63
" 21.		62 50	116 10	181 30	48 58
" 22.		60 00	116 10	176 10	47 19
Totals				137,128 07	$36,752 67

*1.	Amount of debt No. 1 above	$14,250 98
	Am't p'd on said debt, as per statement D to report of March, 1880	12,420 00
	Bal. due on said debt	$1,830 98
*2.	Amount of debt No. 2 above	15,280 72
	Am't p'd on said debt, as per statement D to report of March, 1880	5,604 87
	Balance due on said debt	$9,675 85
614		
†9.	Am't of debt No. 9 above	$323 48
	Amount paid on said debt, as per statement "D" to report of March, 1880	130 00
	Bal. due on said debt	$193 48

Exceptions of A. G. Grinnan Filed to the Above Report of John A. Preston, Com'r. Filed Oct. 23d, 1880.

Exceptions to commissioner's report.

Exception 1st. Because the com'r has not reported the amount of the preferred debt due the plaintiff under the trusts or articles of agreement declaring the trusts of 29 Oct., 1857, and 31 Dec., 1857.

2d. Because he has reported the amount due F. B. Chewning as secured by the mortgage greatly in excess of the true sum due him. There was due him about $10,000 and interest, and he has been overpaid his *pro rata* share.

3d. Because he has reported the amount due Mrs. A. H. Smith, the wife of Wm. K. Smith, greatly in excess of the true amount due her. She was secured in an amount equal to her contingent right of dower in certain lands conveyed by her husband, in which deeds she united. If she is entitled to anything she is not entitled to $25,000 and its interest from date of mortgage. The plaintiff denies that she is entitled to anything. She voluntarily executed the deeds, if at all, and there was no contract between her and her husband that she was to be paid anything for so doing.

A. G. GRINNAN,
By SAM'L PRICE, *His Atto.*

Oct. 27th, 1880.

Deposition of Thos. S. Robson, Returned with Report of Com'r Preston, Made March, 1880, Taken by Com'r Feb'y 28, 1880.

615 Deposition of Thos. S. Robson.

1st question. Please state your residence and occupation.

Answer. I reside in Fayette county, W. Va., and am a surveyor by occupation; also farm some.

2d question. Are you acquainted with the Elk Ridge and Forest Hill tracts of land, situated in Fayette county, on the waters of Armstrong creek, a tributary to the Kanawha river?

Answer. I am acquainted with both of said tracts of land. I saw the division line between said tracts, and also the creek lines; also

the front line of the Wilson and the back line of the Gallatin survey; also the land claimed by the Busters.

3d question. Please state where the land claimed by the Busters and which is now the subject — a suit between Halstead, the owner of the Forest Hill tract, and said Busters, now pending in the U. S. court at Charleston —. If you know, please state the value of said land and the quantity of Busters' claim.

Answer. The land claimed by the Busters and which is the subject of said suit consists of about 100 acres in the front part of the Forest Hill tract and is part of the interlock between the Gallatin and Wilson surveys. The Busters' claim under the Gallatin and the Forest Hill tract is held under the Wilson survey. The said land has several veins of coal upon it, and the coal constitutes its chief value. Taking this into consideration, I think said land is certainly worth $30.00 *dollars* per acre. Its convenience to the railroad makes it more valuable, in my judgment, than land containing the same kind of coal farther back from said road. Said Busters' land is about one mile back from the R. R.

4th question. Please state how the coal on the greater part of the Forest Hill tract would have to be gotten to the R. R. in order to be marketed.

Answer. The chief value of the Forest Hill tract is in its coal and timber, and to get the said coal and timber to market it will have to be brought through the Elk Ridge tract at every point to Armstrong's creek and down said creek to the R. R.

616 5th question. Please state what the value of the right of way through the Elk Ridge tract would be to the owner of the Forest Hill tract.

Answer. The Forest Hill tract contains 2,000 acres and lies along the Elk Ridge tract its whole length, and, as I stated in ans. to the last question, the coal and timber of the Forest Hill tract to be marketed would have to be taken over the Elk Ridge tract. Without an outlet through the Elk Ridge tract the Forest Hill tract would be of little value to its owners, but as to fixing the value of said outlet to the owners in money I am at a loss to know exactly how to estimate it.

6th question. Please state whether or not a road for the transportation of coal and timber could be built at a reasonable expense through Forest Hill tract and on it as an outlet to the river.

Answer. In my opinion it could not. The said tract runs three or three and one-half miles back from the river, on the east side of the dividing ridge between the waters of Armstrong, Morris, and Paint creeks. There are very deep gorges in the side of said ridge that run up above the veins of coal, and there would be no way of getting a road above the heads of them for the transporta- of coal. The cliffs upon these gorges are so nearly perpendicular that to make a road you would either have to tunnel there or at great expense go around them. If you took a road down the gorges the Elk Ridge tract intervenes before you reach Armstrong's creek. Forest Hill tract commences about one mile from the river and runs back along the side of the ridge above mentioned three or four times

its width, and it would be almost impossible to bring the coal from the far end of the tract over it to the river. The only practicable, and, indeed, possible, way is to take it down to Armstrong's creek and thence to the river.

And further this deponent saith not.

T. S. ROBSON.

617 *Affidavit of A. G. Grinnan.*

The affidavit of A. G. Grinnan, who, having been duly sworn, states that he requested the com'r, Preston, appointed to state the accounts to send him a copy of his report, and that he has never received the same, and that owing to the pressure of very important business matters relating to the sale of mineral lands of great value and daily expecting to be notified to meet parties preparing to buy who wished to examine the same that he could not leave home to go to West Va. to examine the papers and reports in the cases above named, and that these cases involved matters of great importance to this affiant, and that no decree ought to be entered in this case until he has had an opportunity of inspecting and examining reports and papers, as great injustice might be done him without such and opportunity; that in any event no decree ought to be entered for distribution until all parties having claims have put in an appearance, and that he believes that two parties having judgments *vs.* Smith has not filed their proof of claims, having probably failed to see order of publication, and that as soon as he can find their addresses he will notify them, and that, further, no order for distribution should be made until the cases of Grinnan *vs.* Edwards, in circuit court of Kanawha Co., and of Halstead *vs.* Busters, in U. S. court at Charleston, are decided; that if decided adversely large claims may arise against the fund in affiant's hands as trustee for distribution, the amount of which it is difficult now to estimate, as related in the amended bill of said Grinnan, the affiant, and that any distribution might inflict great loss on him in certain contingencies.

And, further, affiant states that having had no opportunity of examining the report of Com'r Preston, and that owing to pressing business engagements of large importance he will have none without great probable loss to himself, he cannot tell what part of said report he may wish to except to, and that with large undetermined claims which may arise against the trust fund the said re-
618 port should not be confirmed, but should lie over, with order to Com'r Preston to report in vacation of court any further matters and claims deemed pertinent, and, if necessary, to reform his report.

And affiant further states that there are still some small tracts of land held by him as trustee still unsold, and he expects this spring or summer to sell the same, as better prices can now be had than heretofore, and that by next term of court it is most probable, as the cases referred to are now ready for hearing, all matters in rela-

tion to the trust fund will be brought fully before the circuit court of Fayette county so that your honor can intelligently decide and determine the same.

The affiant further states that he has had no opportunity to consult his counsel, Mr. Blakely, as the affiant has been absent from home for nearly two months, and, on going to Charlottesville to see him on Monday last, found that he was absent from home and would not return for a week.

A. G. GRINNAN.

March 25th, 1880.

VIRGINIA, *Orange County,* } *To wit:*

Personally appeared before me, John G. Williams, a commissioner in chancery in Orange circuit court, A. G. Grinnan, whose name is signed to the foregoing writing, and made oath that the statements contained in said writing are true.

Given under my hand this 25th day of March, 1880.

JOHN G. WILLIAMS, *C. O. C. C.*

Petition of A. G. Grinnan.

In Circuit Court of Greenbrier County, West Va.

CHEWNING *vs.* COWEN }

and

GRINNAN *vs.* LONG. }

The petition of A. G. Grinnan to the hon. judge of the circuit court of Greenbrier county, West Va., relates that in the year
619 1857, during the great financial panic then prevailing, in or about the month of September and in the town of Fredericksburg, Va., he was approached by one Wm. K. Smith, of that place, well known as a reckless speculator and mining operator and by whom many parties had lost money and who was without credit, but whom petitioner had known for many years, and said Smith represented to him that he held valuable coal properties on the Kanawha river or near it, in Fayette county, now in West Va., which he was in great danger of loosing by reason of claims against him and liens on the same which he was wholly unable then to meet, and that one valuable tract of 7,000 acres, then known as Elk Ridge, now divided into Elk Ridge and Forest Hill tracts, on Armstrong creek, had actually been sold under a deed of trust, and had been bought in by one Wm. H. Edwards, who held the lien on it, as will appear more fully by Exhibit "A A," herewith filed, but that

said Edwards had agreed to allow him a short time to pay him a large part of the debt due him and redeem the land and entreated your petitioner to aid him and furnish or raise money to extricate him from his embarrassment, for he could get help nowhere else. For some time your petitioner refused, not knowing the property or its value and knowing that many persons had lost money by said Smith, but so urgent were Smith's entreaties that he finally did agree to render his aid and furnish money to a certain extent. Said Smith promised that he should be subjected to no trouble in handling or selling or caring for the properties other than was agreeable to him; that he himself would meet the other payments to Edwards, and in default thereof they could be paid out of sales of property to be conveyed your petitioner in trust, and which sales he, the said Smith, would negotiate as soon as the times improved, and that your petitioner should be allowed a large interest in said properties, which would realize to him, according to Smith's estimate laid before your petitioner, $48,000 or about that sum, and that your petitioner should render such aid in the premises as would be agreeable to him. It was also agreed
620 that the title to the properties not conveyed in fee to your petitioner should be held by him in secret trust to secure him and other creditors. Your petitioner borrowed for said Smith about $6,442 of G. B. Wallace and went his security therefor, and Smith and wife gave a deed of trust to secure the debts, as will appear by Exhibit "B B" herewith filed. He also furnished him about $1,200, as named in the agreement of trust of Feb'y 19th, 1859, on file in papers of Grinnan *vs.* Long, besides other sums, making the *the* whole amount between $8,000 and $10,000, said Smith owing Edwards about $12,900, as will appear by estimates made in title bond of Edwards to Smith of Oct. 6th, 1857 (see Exhibit "D D"), when only $4,500 are stated to have been paid by Smith to Edwards and of the money furnished by your petitioner, and his note was taken by said Edwards for $8,417, payable in a year. On the next day a deed was executed to said Smith by Edwards, and he gave a deed of trust on Elk Ridge estate, 5,000 acres, to secure said note to Edwards. Said Smith and wife had previously conveyed to your petitioner, with general warranty, one-half of this tract under certain stipulations named in the deed, a copy of which, marked Exhibit "C C," is herewith filed. Its date was Oct. 1st, 1857. It will appear by the foregoing that said Smith did not pay Edwards a large part of the money furnished for that purpose, but applied it to other purposes not contemplated by your petitioner and left a much larger lien on the land conveyed him than was agreed upon and in fact only paid Edwards $4,500, and that this action of Smith was the chief cause of the great trouble and loss which afterwards accrued to your petitioner. After the following year said Smith represented that he had been unable to meet the aforesaid note to Edwards, and that he was about to close the deed of trust on the 5,000-acre tract. Thereupon your petitioner sent Edwards his check on Bank of Republic of New York for $400, with authority to use the same if he would indulge Smith for twelve months. Ed-

wards used the check and in a few weeks advertised by his
621 trustee the land and sold it and bought it in, and your petitioner was forced to go to New York and enjoin said Edwards and engage in a troublesome litigation, resulting finally in a compromise, said Edwards giving a title bond about Oct. 15th, 1860, and your petitioner advancing out of his own funds $3,000, leaving about $6,398 as a lien on the land and for which Edwards held Smith's bond, your petitioner not assuming any liability therefor. Smith failed to make any further payments to said Edwards, and in 1864, in Kanawha circuit court, he, Edwards, obtained a decree for sale of said land and bought it in and still holds the same, though said Grinnan has endeavored to set aside said sale by process of law, and that said property is worth, as he believes, about $100,000, and his interest therein would be worth about $45,000, and that by the failure of Smith to pay up the amount due Edwards, or claimed to be due, your petitioner has lost a large sum of money and most of the profits he expected to make from incurring the large risks he made in undertaking to help said Smith.

Your petitioner further relates that the property he held in trust was on a secret trust until about Feb., 1859, when it became necessary and expedient to declare the trust a copy of trust filed in "Grinnan *vs.* Long." This agreement specially provides that liabilities of said Smith to your petitioner shall be a just claim upon the funds arising from the sales of the trust properties. Now, Smith was liable to your petitioner to make good the payments to Edwards, and there was a special obligation to do so, as the debt had become so large by his failure to pay Edwards the very money furnished him for that purpose. This obligation will appear more clearly by a brief review of the papers.

Exhibit "C C," deed of Oct. 1st, 1857, Smith and wife to Grinnan, conveys ½ of Elk Ridge, with certain stipulations and general warranty.

Exhibit "D D," Oct. 6th, 1857, Wm. H. Edwards gives Wm. K. Smith a title bond for Elk Ridge and Smith executes his note at 12 months for $8,417.20, only paying $4,500 of the money furnished
him by your petitioner.

622 Oct. 7th, 1857, Edwards executes a deed to Wm. K. Smith for Elk Ridge, and Smith executes a deed of trust to secure said note. It will thus be seen that your petitioner was not a party to said note or in any manner bound therefor; it was given after the deed of Oct. 1st to Grinnan.

Oct. 29th, 1857, Wm. K. Smith executes to A. G. Grinnan, with general warranty, a deed to all his property in Fayette county, reciting the former conveyance to your petitioner, and executes an agreement of secret trust upon which the property not to be held in fee by petitioner shall be held in trust, and in this provides 1st for the payment of all liabilities of said Smith to A. G. Grinnan due and which may become due. Smith was then liable to your petitioner for the payment to Edwards of the note aforesaid of $8,417.

August 26th, 1858, Smith acknowledges payment in full by your

petitioner for all property conveyed him. A copy of this paper is filed as Exhibit " E E."

Feb. 12th, 1859, a declaration of trust made and recorded. In or about the year 1859 Wm. H. Edwards ordered John H. Platt, trustee under deed from Smith, dated Oct. 7th, 1857 (Exhibit " J J "), to sell the Elk Ridge property, and it was sold as related and the litigation resulting in a compromise occurred, when Edwards, in 1864, again had the property sold by order of Kanawha circuit court. (See copies marked " M M " filed as exhibits.) It seems that it was held that as Smith had failed to pay his notes to Edwards and the title bond had been given by Edwards to your petitioner as trustee and individually that your petitioner became liable to Edwards for the amount claimed as due by Smith and actually recovered against your petitioner with Smith for $6,348 and interest, though your petitioner had executed no obligation therefor. It is clear that Smith's failure to pay did not relieve him of the obligation to Grinnan, and that the liability was exactly such as was secured under the agreement of trust as a 1st-class debt, and, as by reason of such judgment against your petitioner his property was sold, the trust fund is clearly liable to him for $6,398 and interest as of Oct., 1860,
623 and for damages accruing for loss of property to your petitioner by reason of Smith's failure to pay, and your petitioner asks that the com'r ordered to state and settle the trust accounts be directed by your honor to credit your petitioner accordingly, and report what losses and damages he has sustained. The claim of your petitioner is especially equitable because the care and oversight of the property has involved him in incessant litigation and trouble. Upon visiting the property in 1857 it was found that land warrants had been laid on it by some and others were preparing to do so that had to be drawn off and other questions of title settled. Parties proposing to buy had to be carried to the land, and litigation with Edwards, Cowan, and others involved great fatigue, consumed much time, and required large advances—large taxes had to be paid—and, though your petitioner applied to beneficiaries of the trust for pecuniary advance and aid, it was refused and he had to bear the entire burden alone. Sales not being made in time to pay off all the deed of trust to Wallace (Exhibit " B B "), who held a lien on 1,200 acres of the best part of the Loup Creek estate, your petitioner had the greatest trouble in inducing him to wait and not force a sale, which would have destroyed the chief value of the trust subject. He had also to make frequent journeys north to endeavor to effect a sale, which had become absolutely necessary, requiring large advances and much loss of time and loss in other business matters, and in no manner did he receive aid from any beneficiary. For his advances he only received 6 per cent., when money was worth 12 per cent., and in this manner sustained loss, and he has no hesitation in saying that but for his continuous effort and large expenditure the greater part of trust property would have been lost by reason of Wallace's lien, tax sales, and the various suits and controversies in progress from time to time during the past 23 years.

Your petitioner further represents that said Smith, in the year

1862 or 1863, went over to England and it appears made large sums of money, for he learned that he had bought a service of plate
624 for $10,000 and invested largely in the cargo of a blockade runner with Mondella, Clark, and others, of London, which was captured by the Federal authorities near Matamoras, and that he could have early paid Wm. H. Edwards the amount claimed by him, as communication from London to New York *were* uninterrupted, and saved your petitioner the great loss and damages which afterwards accrued to him.

A. G. GRINNAN.

EXHIBIT "A A," Filed with A. G. Grinnan's Petition.

EXHIBIT A A.

This deed, made the eleventh day of September, one thousand eight hundred and fifty-seven, between Arthur T. Edwards, of the city of New York, of the first part, and William H. Edwards, of the same place, of the second part witnesseth:

Whereas, heretofore, William K. Smith, then of 19 B. Golden square, London, and Abigail H., his wife, did, by a certain deed bearing date the fifth day of August, one thousand eight hundred and fifty-three, grant unto Arthur T. Edwards, the party hereto of the first part, the property hereinafter described,—to have and to hold the same, together with the appurtenances, unto the said Arthur T. Edwards, his heirs and assigns forever,—in trust to secure the payment of certain bills drawn by William H. Edwards upon and accepted by said William K. Smith, and more particularly in said deed described, and in and by which deed it is provided that if the said bills, or any of them, should be and remain unpaid for the term of thirty days next after the last of said bills should have become due, then the said Arthur T. Edwards should expose for sale to the highest bidder for cash the property thereby conveyed, or intended so to be, having given public notice of the time and place of sale for at least two weeks successively in some newspaper published in the city of New York, and out of the proceeds of said sale, after paying costs and charges attending the same and
625 the execution of the said trust, the said Arthur T. Edwards should pay to the said William H. Edwards, his heirs or assigns, the balance that might be due upon the said bills, or any of them, with interest at the rate of five per cent. per annum, and if upon said sale any surplus should remain over and above such costs and charges and sums due upon said bills, such surplus should be paid to said William K. Smith, his heirs or assigns, which deed is recorded in Fayette county clerk's office in Book "D," folio 493; and whereas, the debt due to the said William H. Edwards, the creditor secured by the said deed, having become payable, and default having been made in the payment thereof, the said creditor has required the said trustee, the party hereto of the first part, to sell the property conveyed by said deed in the manner prescribed by said deed; and whereas, the said Arthur T. Edwards caused to

be published daily from the seventh day of August, one thousand eight hundred and fifty-seven, to the twenty-fifth day of said August, both inclusive, in the Morning Courier and New York Enquirer, a newspaper published in the city of New York, a notice that he would sell the said property for cash to the highest bidder, at the Merchants' exchange, in the city of New York, on Tuesday, the twenty-fifth day of August, one thousand eight hundred and fifty-seven, at twelve o'clock m.; and whereas, the sale of the said property was, at the request of said William K. Smith, adjourned to Wednesday, the ninth day of *of* September, one thousand eight hundred and fifty-seven, at the same hour and place, notice of which adjournment was published, together with the said original notice of sale, in the newspaper aforesaid, daily from the twenty-sixth day of August, one thousand eight hundred and fifty-seven, to the ninth day of September, one thousand eight hundred and fifty-seven, both inclusive; and whereas, the said property was, upon the said ninth day of September, one thousand eight hundred and fifty-seven, at twelve o'clock m., at the Merchants' exchange, in the city of New York, exposed for sale at public auction under the direction of the said trustee, and knocked down to and sold to William H.
626 Edwards, the party hereto of the second part, for the sum of seven thousand dollars, that being the highest sum bidden for the same: Now this deed witnesseth, that the said party of the first part, in consideration of the said sum of seven thousand dollars, doth grant unto the said party of the second part all that certain tract of land lying and being in the county of Fayette and State of Virginia, upon the western side of Armstrong's creek, a southerly branch of the Great Kanawha river, containing seven thousand acres, more or less, being all that part of a survey known as the "Wilson survey," lying between lands owned by the Paint Creek Coal and Iron Mining and Manufacturing Company and lands formerly conveyed by William H. Edwards and wife to Charles M. Wilkins, and now wholly or in part belonging to the Mount Carlon Coal Mining Company, which said tract of seven thousand acres was conveyed by William H. Edwards and wife to said William K. Smith by deed dated August first, one thousand eight hundred and fifty-three, to which reference is hereby made for a more full description, together with all the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining,—to have and to hold all and singular the above-mentioned and described premises, together with the appurtenances, unto the said William H. Edwards, the party of the second part, his heirs and assigns, forever.

In witness whereof, the party hereto of the first part hath hereunto set his hand and seal the day and year first above written.

ARTHUR T. EDWARDS. [L. S.]

Sealed and delivered in presence of—

The words "twenty-fifth" written on erasure, 3d page, before execution.

JOHN BISSELL.
JOHN H. PLATT.

627 UNITED STATES OF AMERICA, } *ss:*
State, City, and County of New York, }

I, John Bissell, a commissioner appointed by the governor of the State of Virginia, and under the laws of said State passed 14th February, 1844, with full power and authority to take acknowledgments or proof of all deeds or other instruments in writing, depositions, and other testimony, &c., &c., in and for the State of New York, to be used in said State of Virginia, duly commissioned by said governor and affirmed, and dwelling in the city of New York, do by this public instrument, given under my hand and official seal, certify and make known that on the 11th day of September, one thousand eight hundred and 57, before me personally appeared in my State aforesaid Arthur T. Edwards, whose name is signed to the annexed instrument, bearing date the 11th day of September, 1857, who acknowledged the same before me, the said John Bissell, commissioner for Virginia.

JOHN BISSELL,
Wall Street, New York.

[Commissioner John Bissell, New York.]

STATE OF VIRGINIA:

FAYETTE COUNTY COURT CLERK'S OFFICE, *January 5th*, 1858.

The foregoing deed, with the certificate of acknowledgment thereto annexed, was this day received for record and is thereto admitted.

Teste: J. B. JONES, *Cl'k.*

EXHIBIT B B, Filed with A. G. Grinnan's Petition.

Deed of Trust to Secure G. B Wallace.

EXHIBIT B B.

This indenture, made this first day of October, in the year eighteen hundred and fifty-seven, between Wm. King Smith and Abigail H., his wife, of the one part, and James S. Wallace, of the other part, all of Fredericksburg, Virginia, witnesseth:

That whereas, said Smith is indebted to Gustavus B. Wal-
628 lace, of King George, in Virginia, in the sum of sixty-four hundred and forty-two dollars, to which debt A. G. Grinnan is a surety, as will appear by the bond of said Smith and Grinnan to said Gustavus B. Wallace, of even date herewith, and due at twelve months, with six per cent. interest, and is willing and desirous of further securing the same: Now, therefore, in consideration of the premises, and the sum of one dollar in hand paid, the said party of the first part do hereby grant and convey, with general warranty, to the party of the second part twelve thousand acres of a certain tract of forty thousand acres conveyed to said Smith by deed from Wm. H. Edwards and wife in December, 1852, and lying in Fayette county, Virginia, near the Great Falls of the Kanawha, and on the waters of Loop and other creeks,—said twelve thousand acres bounded

as follows: Commencing at the intersection of the east line of the Mount Carbon property with the south line of said forty-thousand-acre tract; thence with the said east line of the Mt. Carbon property to the intersection with the line nearest and parallel to the Kanawha river at or near the mouth of Loop creek; thence up the river and along the line parallel thereto two miles and a half; thence to the back lines of said tract, so as to contain twelve thousand acres, free from claims or incumbrances,—to have and to hold the same, upon trust, nevertheless, to secure a debt of sixty-four hundred and forty-two dollars due to said Gustavus B. Wallace, and to secure said Grinnan as the surety of the same, it being understood said trustee shall sell the said land (upon the failure of said Smith to pay said debt) when requested so to do by said Gustavus B. Wallace or said A. G. Grinnan, giving first forty days' notice of the time and place of sale.

Witness the following signatures and seals:

W. K. SMITH, [SEAL.]
A. H. SMITH. [SEAL.]

The words "of the east" in 21 line, interlined before signing; also word "south" on 22 line.

629 CORPORATION OF FREDERICKSBURG, *To wit:*

I, George F. Chew, a notary public for the corporation aforesaid, in the State of Virginia, do certify that William King Smith, whose name is signed to the writing hereto annexed, bearing date on the first day of October, 1857, has acknowledged the same before me in my corporation aforesaid.

Given under my hand this 1st day of October, 1857.

GEO. F. CHEW,
Notary Public.

STATE OF VIRGINIA, *To wit:*
Corporation of Fredericksburg,

I, George F. Chew, a notary public for the corporation of Fredericksburg, in the State of Virginia, do certify that Abigail H. Smith, the wife of William King Smith, whose names are signed to the writing hereto annexed, bearing date on the 1st day of October, 1857, personally appeared before me in the corporation aforesaid, and, being examined by me privily and apart from her husband and having the writing aforesaid fully explained to her, she, the said Abigail H. Smith, acknowledged the said writing to be her act and declared that she had willingly executed the same and does not wish to retract it.

Given under my hand this 1st day of October, 1857.

GEO. F. CHEW,
Notary Public.

FAYETTE COUNTY COURT CLERK'S OFFICE, *October* 10, 1857.

The foregoing deed in trust, with the certificate of acknowledgment thereto annexed, was presented in said office and is admitted to record.

Teste: J. B. JONES, *Cl'k.*

A copy.

Teste: J. B. JONES, *Cl'k.*

EXHIBIT "C C," Filed with Grinnan's Petition.

630 EXHIBIT C C.

This indenture, made this first day of October, in the year 1857, between W. K. S. and A. H., his wife, of the one part, and A. G. G., all of Fredericksburg, Va., of the other part, wit.:

That for full and valuable consideration secured this day by s'd parties of the first part from the party of the 2d part, the said parties of the 1st part do grant and convey to the party of the second part, with general warranty, one undivided half of a tract of 2,000 acres lying on the Kanawha river, in Fayette Co., Va., near waters of Armstrong Cr., being that part of a tract of seven thousand acres conveyed by Wm. H. Edwards and wife to said Smith, which will include ½ of the frontage of said tract towards the Kanawha river, and extending thence back thro' the middle of the tract, and thence westward to the west line of the tract, so as to include 2,000 acres free of all claims and incumbrances, together with the undivided ½ of 200 acres lying between said tract of 7,000 acres and the Kanawha river; and the said parties of the first part do covenant to and with said Grinnan that they will relieve said tracts of 2,000 and 200 acres from any liens thereon; and further, that he shall have an interest in the remaining 5,000 acres of s'd tract of 7,000 to this extent, that he shall have and receive one ½ of the proceeds or profits of said 5,000 acres after deducting therefrom the sum of $10,000, and that in any contract hereafter made for the sale of said tract, the consent of said Grinnan thereto shall be obtained as necessary to its validity.

Witness the following signatures and seals:

(Signed) W. K. SMITH. [SEAL.]
A. H. SMITH. [SEAL.]

The words "of the one part" in 3d line, interlined before signing.

Acknowledged before Geo. F. Chew Oct. 1st, 1857, and wife privily examined. Recorded in Fayette Co., Book E, page 78, Oct. 10th, 1857.

631 EXHIBIT "D D," Filed with Petition of A. G. Grinnan.

EXHIBIT D D.

In consideration of the sum of four thousand five hundred dollars to me in hand paid by William K. Smith, of Fredericksburg, Vir-

ginia, and of his promissory note, dated the first day of October, 1857, payable to my order on the 1st day of October, 1858, for the sum of eight thousand four hundred and seventeen $\frac{20}{100}$ dollars, I do hereby bind myself, my heirs, executors, and administrators to sell and convey to said Wm. K. Smith, his heirs, or assigns, by deed of special warranty, a tract of land situated in Fayette county, Virginia, on the west side of Armstrong's creek, containing about five thousand acres, be the same more or less, being five undivided one-seventh parts of a tract said to contain seven thousand acres, part of the Wilson survey, and which was conveyed heretofore in 1853 by me to said Smith by deed duly recorded in the clerk's office of said Fayette county, to which deed reference is hereby made for description and boundaries, the said five-seventh parts to be laid off on the east side of *of* said seven thousand acres, said deed to be delivered to said Wm. K. Smith, duly executed, on or before the 1st day of November, 1857, and now next, upon the delivery by said Wm. K. Smith to me of a deed of trust executed by himself and wife, according to the form and tenure prepared by my counsel, as security for the payment of the note aforesaid, and further to convey to said Wm. K. Smith by special warranty the remaining two undivided seventh parts of said seven thousand acres on or before the 1st day of November, 1857, and now next.

In witness whereof I have hereunto set my hand and seal, at New York, this sixth day of October, 1857.

WM. H. EDWARDS. [L. S.]

In presence of—
SAMUEL MARTIN.
MOSES B. MACLAY.

632 STATE OF NEW YORK, *City and County of New York,* } *To wit:*

I, Moses B. Maclay, residing in the city, county, and State of New York, a commissioner appointed by the governor of the State of Virginia for the said State of New York, certify that William H. Edwards, whose name is signed to the title bond hereto annexed, bearing date on the sixth day of October, in the year one thousand eight hundred and fifty-seven, hath acknowledged the same before me in my State aforesaid.

Given under my hand and seal of office this 7th day of October, one thousand eight hundred and fifty-seven.

MOSES B. MACLAY,
[L. S.] *Virginia Commissioner.*

VIRGINIA:

FAYETTE COUNTY COURT CLERK'S OFFICE, *January 5th*, 1858.

The foregoing title bond, with the certificate of acknowledgment thereto annexed, was this day received for record and is thereto admitted.

Teste: J. B. JONES, *Clk.*

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Exhibit referred to in petition as "E E" not found in papers.
J. MAYS, *Cl'k.*

EXHIBIT "I I," Filed with A. G. Grinnan's Petition.

EXHIBIT I I.

This deed, made the seventh day of October, 1857, between William K. Smith, of Fredericksburg, Virginia, and Abigail H., his wife, of the first part, and John H. Platt, of New York, of the second part, witnesseth:

That the said William K. Smith doth grant unto the said John M. Platt the following property, viz., all that certain
633 tract of land situate in the county of Fayette, and State of Virginia, upon the western side of Armstrong's creek, a southerly branch of the Great Kanawha river, which was conveyed to said William K. Smith by William H. Edwards and wife, by deed bearing even date with these presents—for the boundaries and description of which land reference is hereby made to said deed, which is intended to be recorded in the clerk's office of said Fayette county,—the said tract hereby conveyed containing five thousand acres, more or less, and being part of a tract of 85,600 acres patented to Benj. Martin, in trust to secure to the said William H. Edwards the payment of a promissory note executed to the said Edwards by the said Smith for the amount of eight thousand four hundred *hundred* and seventeen $\frac{20}{100}$ dollars, and payable on the 1st day of October, 1858; and if the said note shall be and remain unpaid three days after the same shall be due and payable, then the said John H. Platt shall expose for sale to the highest bidder for cash the property hereby conveyed or intended so to be—having given public notice of the time and place of sale for two weeks successively in some newspaper published in the city of New York, and out of the proceeds of said sale, after paying costs and charges attending the same and the execution of this trust, the said John H. Platt shall pay to said William H. Edwards, his heirs and assigns, the sum that shall be due upon the said note; and if upon said sale any surplus shall remain over and above such costs and charges and the sums due upon said note, such surplus shall be paid to said William K. Smith, his heirs or assigns.

In witness whereof, the parties have hereunto set their hands and seals the day and year first above written.

W. K. SMITH. [L. S.]
A. H. SMITH. [L. S.]

In presence of—
SAMUEL MARTIN.
MOSES B. MACLAY.

634 STATE OF NEW YORK, } *To wit:*
City and County of New York, }

I, Moses B. Maclay, residing in the city, county, and State of New York, a commissioner appointed by the governor of the State of

Virginia for the said State of New York, certify that William K. Smith and John H. Platt, whose names are signed to the deed of trust hereto annexed, bearing date on the seventh day of October, in the year one thousand eight hundred and fifty-seven, have acknowledged the same before me in my State aforesaid.

Given under my hand and seal of office this 7th day of October, one thousand eight hundred and fifty-seven.

MOSES B. MACLAY,
Virginia Commissioner.

STATE OF VIRGINIA,
Corporation of Fredericksburg, } *To wit:*

We, William H. White and Peter Goolrich, justices of the peace for the corporation of Fredericksburg, in the State of Virginia, do certify that Abigail H., the wife of Wm. K. Smith, whose names are signed to the writing above, bearing date the 7th day of October, A. D. 1857, personally appeared before us, in the corporation aforesaid, and, being examined by us privily and apart from her husband and having the writing aforesaid fully explained to her, she, the said Abigail H. Smith, acknowledged the said writing to be her act and declared that she had willingly executed the same and does not wish to retract it.

Given under our hands this 22d day of January, 1858.

WM. H. WHITE, *J. P.*
PETER GOOLRICH, *J. P.*

FAYETTE COUNTY COURT CLERK'S OFFICE, *January* 30, 1858.

The foregoing deed in trust was presented in said office for record and, being duly acknowledged, is thereto admitted.

Teste: J. B. JONES, *Cl'k.*

A copy.
Teste: J. B. JONES, *Cl'k.*

635 There is a paper, a deed from Wm. K. Smith to A. G. Grinnan, dated Oct. 29th, 1857, conveying all the estate of the grantor in Fayette county, Virginia, to the grantee, which is marked "Exhibit 'G G,' petition of Grinnan." Same deed is Exhibit No. 1 of Chewning's bill *vs.* Cowan and others, but is not made a part of the petition, as I can see, but found in the papers.

J. MAYS, *Cl'k.*

The following purport to be copies of a notice of sale and a decree confirming sale and are marked Exhibit "M M" of Grinnan's petition.

EXHIBIT M M.

Commissioner's Sale.

Pursuant to a decree of the circuit court of Kanawha county rendered at the June term, 1864, in the cause of Wm. H. Edwards *vs.* Andrew G. Grinnan, Wm. K. Smith, and Abigail H. Smith, in

chancery, I will, as commissioner, before the court-house door of Kanawha county, on the 30th day of August, 1864, at public auction, to the highest bidder, — a certain tract of land lying on the west side of Armstrong's creek, in the county of Fayette, containing 5,000 acres, more or less, the said tract being bounded as follows: North by line of Wilson survey; west by a tract of 2,000 acres formerly conveyed by Wm. H. Edwards to Grinnan and Smith and by lines along the dividing ridge between Paint and Armstrong Cr.; south by the southerly or back line of Wilson survey, and east by the land formerly owned by Mt. Carbon Coal Co. Terms of sale made known on day of sale.

(Signed) WM. G. RAND, *Com'r.*

Decree.

And at another day, to wit, at a circuit court held for Kanawha county, at the court-house thereof, on the 7th day of October, 1864.

This cause came on to be heard this 7th day of Oct., 1864, upon the former proceedings therein, upon the deed of Edwards
636 and wife filed in the cause, and upon the report of Wm. G. Rand, commissioner appointed by the court to sell the land in the bill mentioned, and there being no exceptions to said report, whereupon it is adjudged, ordered, and decreed that the report of said Rand be, and the same is hereby, confirmed; and it appearing by said report that William H. Edwards was the purchaser of said land at the sale and the same was sold to satisfy the debt decreed to him in this suit, and that the said Edwards has satisfied the costs of sale and is liable for the costs of this suit, which united exhaust the proceeds arising from such sale, wherefore it is adjudged, ordered, and decreed that the said commissioner, William J. Rand, do convey to the said Edwards the five thousand acres of land described in the deed of said Edwards and wife to defendant, Andrew G. Grinnan, dated the 21st day of July, 1864, and filed in this same cause as an exhibit, hereinbefore referred to, and in the name and behalf of said Andrew G. Grinnan, and duly acknowledged the same for record in the proper county for its recordation, for which deed he shall be allowed the sum of $5 to be taxed in the bill of costs; and it was further ordered that said plaintiff recover the costs by him incurred in the prosecution of his suit in this behalf.

Second Petition of A. G. Grinnan.

In Circuit Court of Greenbrier County.

To his honor the judge of the circuit court of Greenbrier county, West Va.:

Your petitioner, A. G. Grinnan, shows that by the terms of an agreement between himself and Mrs. Abigail H. Smith and her husband, Wm. K. Smith (both of whom are now deceased), of date June, 1859, and further confirmed by deed of date April, 1867, copies of which are on file in above-named causes, said Grinnan was made a trustee

for Mrs. Abigail H. Smith to receive and hold for her use and benefit and subject to her order all moneys coming to her as related in said paper, and that he is thus entitled to receive from himself as trustee under agreement with Wm. K. Smith all amounts
637 due Mrs. Abigail Smith aforesaid. Considerable sums of money, amounting to several thousand dollars, as stated in report of com'r in cases above named, have been paid to Mrs. Smith aforesaid during her lifetime as such trustee, and also to her administrator, Dr. F. B. Chewning, who qualified in Fredericksburg, Va., as her adm'r after her death, but now he finds that in or about the month of September, 1866, after the death of her husband aforesaid, that the said Mrs. Smith, then living in London, England, supposing herself entitled to all the lands her said husband formerly held, did convey ⅓ of these lands and properties, or did attempt to convey them, to Henry Owen, of London, to whom she was indebted, and that the deed (a copy of which, marked "F F," is herewith filed as exhibit) was recorded in Kanawha Co., West Va., and not in Fayette Co. Your petitioner, not knowing what claims may arise against him under this deed, asks that said Owen may be made a party defendant in above-named causes, and by due publication served with proper notice (unless your honor should — a separate bill and proceedings necessary) and his rights and claims adjudicated so that he may be hereafter estopped from setting up any claims or demands against your petitioner after matters connected with these suits have been otherwise settled. And, &c.

A. G. GRINNAN.

May 18th, 1880.

EXHIBIT "F F" OF A. G. GRINNAN'S SECOND PETITION LAST AFORESAID.

EXHIBIT F F.

This indenture, made the 29th day of September, one thousand eight hundred and sixty-six, between Abigail Henssler Smith, of 340 Harvey Terrace, New Cross Road, in the county of Kent, the widow of the late William King Smith, of Fredericksburg, in the State of Virginia, in the United States of America, merchant, of the one part, and Henry Owen, of 123 Fenchurch street, in the city of London, merchant, of the other part:

638 Whereas the said Abigail Henssler Smith is seized of or otherwise well entitled to the inheritance in fee simple of certain land and coal and mineral estates in America hereafter described; and whereas, the said estates are at present unproductive, and can only be made productive by skilful and energetic management and a considerable expenditure of time and capital; and whereas, the said Abigail Henssler Smith hath requested the said Henry Owen to proceed to America and to cause the said estate to be surveyed and explored, to manage and superintend, and if necessary improve the same, with the view of putting them into a fit state to enable the said Henry Owen to sell, lease or otherwise

realize the value of the whole, or any part thereof in England, or elsewhere, as he may deem advisable; and whereas, the said Abigail Henssler Smith hath proposed to the said Henry Owen as the consideration and inducement for him so to proceed to America for the purpose aforesaid to convey to him, the said Henry Owen, one undivided third part or share of such estate for his own absolute use and benefit, and the said Henry Owen hath accordingly agreed forthwith to proceed to America, and undertake such duties as aforesaid, in consideration of such absolute conveyance as aforesaid, but all the money out of pocket and travelling and other expenses in and about the premises properly paid by him, the said Henry Owen, is to be repaid to him, in the first instance, out of the profits and proceeds of the entirety of the said estate or the monies raised by sale of mortgage thereof,—the intention of the parties being that the consideration on his part for such absolute conveyance shall be the expenditure of his time and energy and his care and trouble alone; and whereas, the said Abigail Henssler Smith is indebted to the said Henry Owen in certain moneys advanced by him to her during her residence in England, and she hath requested the said Henry Owen not to require repayment of the same in further consideration of such absolute conveyance as aforesaid, to which the said Henry Owen hath agreed, and doth hereby
639 release the said Abigail Henssler Smith, her executors and administrators, estates and effects, of and *and* from all claims and demands in respect of all such sums and moneys: Now, this indenture witnesseth, that for the considerations and in pursuance of the agreements aforesaid, she, the said Abigail Henssler Smith, in exercise of ever- power enabling her in this behalf, doth hereby direct, limit and appoint, and by virtue of every estate and interest, doth hereby grant and confirm unto the said Henry Owen, his heirs and assigns, all that undivided one-third of those freehold, coal and mineral estates, the same into three equal parts divided, situate near to and partly on the River Kanawha and partly on the River Elk, in the district of ——, in the county of ——, in the State of Virginia, in the United States of America, comprising fifty thousand acres or thereabouts, together with all mines, minerals, buildings, rights, easements, advantages and appurtenances whatsoever to the said hereditaments appertaining, or with the same held or enjoyed, or reputed as part thereof, or appurtenant thereto, and all the estate and interest of the said Abigail Henssler Smith and William King Smith in the said one-third of the said premises,—to hold the said premises unto the said Henry Owen, his heirs and assigns, to the use of the said Henry Owen, his heirs and assigns; and the said Abigail Henssler Smith doth hereby, for herself, her heirs, executors and administrators, covenant with the said Henry Owen, his heirs and assigns, that notwithstanding anything by the said Abigail Henssler Smith done or knowingly suffered, she, the said Abigail Henssler Smith, now hath power to appoint and grant all the said premises to the use of the said Henry Owen, his heirs and assigns, free from incumbrances, and that all the said undivided one-third of and in the said premises shall be quietly entered into,

held and enjoyed by the said Henry Owen his heirs and assigns, without any interruption by the said Abigail Henssler Smith or any person claiming through or in trust for her, and that she, the said Abigail Henssler Smith, and her heirs and every other person claiming through or in trust for her, will at all times, at the cost of said Henry Owen, his
640 heirs or assigns, execute and do all such assurances and things, whether according to the laws of the said State of Virginia or of the United States of America or of England, for the further or better assuring all or any of the said premises to the use of the said Henry Owen, his heirs and assigns, as by him or them shall be reasonably required; and he, the said Henry Owen, his heirs, executors and administrators, doth hereby covenant and agree with and to the said Abigail Henssler Smith, that he, the said Henry Owen, shall and will forthwith proceed to Virginia aforesaid and survey, or cause to be surveyed, the whole of the aforesaid estates, and will use the best of his skill and ability to manage and improve the same, and will provide and expend all sums and capital necessary for these purposes, and will thereupon let, lease, sell or mortgage the same as may be most expedient, for the best rents, prices or sums that can be obtained for the same, and in such manner as to make the said estate most productive or remunerative, and will duly account to the said Abigail Henssler Smith, her heirs, executors or administrators, for the two third parts of the said rents, produce, profits or moneys, and will duly pay over to her or them the two third parts of all sum and sums of money for such rents, profits or produce, or produced by sale or mortgage of the said estates; and this indenture further witnesseth, that in consideration of the premises, she, the said Abigail Henssler Smith, doth hereby, for herself, her heirs, executors, administrators and assigns, covenant with the said Henry Owen, his heirs and assigns, that she, the said Abigail Henssler Smith, her heirs or assigns, will at all times (unless prevented by fire or other inevitable accident), upon the request in writing of the said Henry Owen, his heirs, appointees or assigns, or any person lawfully or equitably claiming through him or them any estate or interest in the said hereditaments comprised in the hereinbefore recited indenture, at the expense of the person or persons requiring the same, produce to him or them, or to such person or persons as he or they shall ap-
641 point, or in any court of judicature, or elsewhere as occasion shall require, all or any of the deeds and writings which may be in the custody, possession or power of the said Abigail Henssler Smith, or in the possession, custody or power of any person or persons on her behalf, for the support or manifestation of the estate or title of the said Henry Owen, his heirs, appointees and assigns, and every or any other person claiming as aforesaid, and upon such request, and at such expense as aforesaid, make and deliver to the person or persons requiring the same, or to such person or persons as he or they shall appoint, such true copys, attested or unattested, of the same deeds and writings as he or they may require, and in

the meantime keep the said deeds and writings safe, uncancelled and undefaced.

In witness whereof, the said parties to these presents have hereunto set their hands and seals the day and year first above written.

ABIGAIL HENSSLER SMITH. [SEAL.]
HENRY OWEN. [SEAL.]

Signed, sealed, and delivered by the within-named Abigail Henssler Smith in the presence of—
P. J. GORDON,
26 *Old Broad Street, Sols.*

Signed, sealed, and delivered by the within-named Henry Owen in the presence of—
CHAS. JOS. MULLENS,
Clerk to Howard, Dollman & Luther, Sol's, 141 *Fenchuich Street.*

Be it known that Mrs. Abigail Henssler Smith and Mr. Henry Owen, the parties named and described in the deed of conveyance hereunto annexed, personally came and appeared before me, Salem Constable Harris, of London, notary public by royal authority, duly admitted and sworn, and acknowledged the said deed of conveyance to be their respective and several acts and deeds.

642 In testimony whereof I have hereunto set my hand and affixed my seal of office this first day of October, one thousand eight hundred and sixty-six.

[SEAL.] SALEM C. HARRIS, *Not. Pub.*

CONSULATE OF THE UNITED STATES OF AMERICA AT LONDON.

I, Freeman H. Morse, consulate of the United States of America for London and the dependencies thereof, do hereby make known and certify to all whom it may concern that Salem Constable Harris, who hath signed the annexed certificate, is a notary public, duly admitted and sworn and practicing in the city of London aforesaid, and that to all acts by him so done full faith and credit are and ought to be given in judicature and thereout.

In witness whereof I have hereunto set my hand and affixed the seal of the consulate of the United States at London aforesaid this first day of October, in the year of our Lord one thousand eight hundred and sixty-six, and in the 91st year of the Independence of the said United States.

[SEAL.] F. H. MORSE.

STATE OF WEST VIRGINIA, *ss:*

KANAWHA COUNTY RECORDER'S OFFICE, *6th February,* 1867.

This deed was this day presented to me, and thereupon, the same being duly stamped ($15.00), together with the certificates thereto annexed, is admitted to record.

Teste: JNO. SLACK, *Rec'r.*

643 STATE OF WEST VIRGINIA, } *To wit:*
County of Kanawha, }

I, Hamilton Morris, clerk of county court of Kanawha county, in the State aforesaid, do hereby certify that the foregoing is a true copy from the records in my office of a deed from Abigail Henssler Smith to Henry Owen.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 5th day of May, 1879, and the 17th year of the State.

Teste: HAMILTON MORRIS,
[L. S.] *Clerk Kanawha County Court.*

Petition of J. N. Tifft.

In the Circuit Court of Greenbrier County, W. Va.

The petition of J. N. Tifft, of New York city, surviving partner of J. W. Corless & Co., who were assignees of Bacon, Dodge & Co., to his honor the judge of Greenbrier circuit court, West Va., relates that in the year —— Wm. K. Smith, of Fredericksburg, Virginia, borrowed of Dodge, Bacon & Co. the sum of (£3,000) three thousand pounds sterling, and executed his note or bond therefor—copy of which, marked —, is herewith filed—and also executed a mortgage on ⅛ part of the Loup Creek estate in Fayette Co., West Va., estimated to contain 40,000 acres, but which did not contain over 2,400 acres, with covenant of general warranty, and that said Smith failed to pay the bond or note aforesaid, and that said Dodge, Bacon & Co. filed their bill in Fayette circuit court and procured a judgment against said Smith and foreclosed the mortgage, selling said land on the 10th day of February, 1859, and became the purchaser thereof at the price of $10,000, and the costs of suit were $242.42, leaving the sum of $9,757.58 to be credited on said obligation of Wm. K. Smith to Dodge, Bacon & Co., ⅓ thereof on the 10th of Au-
644 gust, 1859, ⅓ on the 10th of August, 1860, and the other ⅓ on 10th of May, 1861, and that after deducting three credits of time named the court ordered execution to issue for the balance due, which amounts to ——, as will appear by copy of decree marked "B," herewith filed, by which it will also appear that J. W. Corliss & Co. became the assignees of Dodge, Bacon & Co. No payment has been made upon the said debt since that time and the said balance is now due, with interest.

Your petitioner further shews that on the 29th of October, 1859, said Wm. K. Smith did convey to A. G. Grinnan all his real estate in Fayette county, West Va., for a nominal consideration, but really to hold as trustee to secure the payment of the debts of said Smith, and that a paper was executed between said Smith and Grinnan to define the trust, which was then a secret one. The said paper, a copy of which is herewith filed, marked "C," was duly acknowledged before a notary public, but was not recorded. This paper secured all the debts of the said Smith, with a memorandum attached to it,

and executed afterwards, excluding from the benefit of the trust creditors who would attempt, by suit or otherwise, to subject the property therein conveyed to the payment of their debt to the prejudice of the creditors, and your petitioner states that J. W. Corless & Co. never did attempt thus to subject the land conveyed to said Grinnan to the payment of their debt, the land upon which said mortgage was having never been conveyed to said Grinnan, and that therefore they held a vested right under the terms of the said paper defining the secret trust to come in with other creditors and participate in any division of the proceeds of said trust property, but that on the 12th of February, 1859, said Grinnan and Smith executed a declaration of the secret trust by a new agreement, which was duly recorded. This said new agreement generally corresponded with the paper executed on 29th Oct., 1857, except that it undertook to exclude the debt of Dodge, Bacon & Co. from the participation of any benefit or division of assets arising from the sale of trust property. A copy of this paper is filed in the papers of Chewning *vs.* Cowan and Grinnan *vs.* Long.

645 Now, your petitioner learns that there are funds liable to distribution *pro rata* in the cases aforesaid arising from sales of property held by said Grinnan in trust and insists that as surviving partner of J. W. Corless & Co., who were assignees of said Dodge, Bacon & Co., that he is fully entitled to come in and share *pro rata* with the other creditors of said Smith in the distribution of said trust assets; that under the first and *and* secret agreement of trust, made when the property was conveyed to the said Grinnan in trust, the debt due Dodge, Bacon & Co. was not excluded, but was really included in said secret trust agreement, and that said property was, therefore, really conveyed — said Grinnan, trustee, with the understanding that the debt of Dodge, Bacon & Co. *were* secured along with those of other creditors, and therefore, upon the execution of the agreement defining the trust, the said Smith and Grinnan had no right to attempt to exclude the said claims of Dodge, Bacon & Co. from the benefit of said declaration of trust, for they had a vested right under the agreement executed when the deed was made and therefore, under the deed of Oct. 29, 1857, to participate, and that, moreover, it is especially equitable that they should participate, because the 5,000 acres conveyed — Dodge, Bacon & Co. to secure their debt was conveyed with general warranty, and if the quantity of land had not fallen short it might have sold for enough to pay their debt, but that instead of 5,000 acres there was only about 3,000 acres, a deficiency of about 2,000 acres, and that if the original debt of £3,000 sterling due Dodge, Bacon & Co. by said Smith was legally excluded from all benefit under trust agreement of Feb'y 12th, 1859, the right of action of Dodge, Bacon & Co. against Smith was not excluded, because it was not then known to exist, and only became known about the year 1870 or 1872, and though said right of action was not known to exist until the time named it relates back to the time the said mortgage was executed and constitutes a claim upon said trust fund as of that date and,

therefore, included in its provisions. Your petitioner, there-
646 fore, in view of the premises, petitions that the commissioner appointed to state the accounts of the said Grinnan, as trustee and distributor of the fund assets, be directed to ascertain the amount due J. W. Corless & Co., assignees, on the judgment aforesaid and on claim for breach of warranty and assign said claims their distributive shares of said assets.

Your petitioner further shows that on said secret-trust agreement the debt due F. B. Chewning and acknowledged to be due him *or* stated specifically at the exact sum of $10,000, and this sum is only secured or named as entitled to a distributive share, and that whereas the 2d agreement of trust aforesaid or declaration of trust named that this debt of Chewning might be something over $10,000, even this did not contemplate securing or acknowledging as due any large sum over $10,000, and especially any sum double that amount, and your petitioner claims that the amount acknowledged to be due the said Chewning in the first agreement of trust aforesaid and which alone is binding of $10,000 is all upon which he can rightfully claim a distribution, and he excepts to so much of any reports of said commissioner as have allowed or will allow more. Your petitioner only learned within the past few weeks of the existence of the said secret-trust agreement and of his rights thereunder, and could not possibly have presented his claim at an earlier date.

J. N. TIFFT,
By His Attorney.

May, 1880.

EXHIBIT "B," Filed with Petition of J. N. Tifft.

EXHIBIT B.

At a circuit court continued and held in and for the county of Fayette, at the court-house thereof, on the 9th day of June, 1859.

DODGE, BACON & Co. } In Ch'c'y.
vs.
WM. K. SMITH. }

This cause came on again to be heard upon the papers for-
647 merly read and report of Samuel Price, com'r, of the sale of the land hereinbefore decreed to be sold, whereby it appears that a sale of said land was made at Fayette court-house after the same had been duly advertised on the 10th day of February, 1859, and that J. W. Corliss & Co., by their agent, became the purchasers at the price of $10,000; that $236.42 *cents* were paid down, which, with the sum of $6 paid by the said purchasers for advertising in New York, making in all $242.42 *cents*, is the whole amount of the costs of suits and the costs of sale, and, there being no exceptions to said report, it is adjudged, ordered, and decreed that the same be confirmed, and, it appearing that the said J. W. Corliss & Co. are the assignees of Dodge, Bacon & Co. and entitled to the mortgage

debt hereinbefore decreed to the plaintiffs, the bond of the purchasers is ordered to be cancelled and the said mortgage debt decreed to the plaintiffs be credited with $9,757.58 *cents*, one-third thereof on the 10th of August, 1859, another third as of the 10th of August, 1860, and the other third as of the 10th of May, 1861, and for the residue of the said sum decreed the plaintiffs they may have execution against the defendants, and John B. Jones is appointed to convey to the said J. W. Corliss & Co. the land aforesaid at their cost and upon their application.

A true copy.

Teste: E. H. EASLEY, *Cl'k.*

EXHIBIT "C," FIled with Petition of J. N. Tifft.

EXHIBIT C.

These articles of agreement entered into this 29th day of October, in the year eighteen hundred and fifty-seven, between Wm. King Smith and A. G. Grinnan, witness.:

That, whereas, the said Smith and wife have, by deed of even date herewith, granted to said Grinnan all the real estate of the said Smith in Fayette Co.: Now, therefore, it is understood and agreed that said Grinnan has an absolute fee-simple title in one-half of the tract of 15 acres therein named, together with the right 648 of constructing roads from any property of said Grinnan in and through said lands therein conveyed, and that the remaining property therein named shall be held by said Grinnan for the following uses and purposes and in the following manner, to wit: That said Grinnan shall have the right to sell and convey said remaining property after expiration of eighteen months, should he deem it necessary to pay any claim due, or which may become due, from said Smith to him or to — person for whom he is agent, or at any time at the request of said Smith or his personal representative, paying from the net proceeds of sale first the debts due or which may become due said Grinnan, or persons for whom he is agent, or for which said Grinnan may be liable, together with such remuneration as may be deemed right; secondly, the acknowledged debts due or which may become due by said Smith, including the amount due Mrs. Wm. King Smith or her trustee for former relinquishments of property to satisfy creditors, estimated at twenty-five thousand dollars, to be held in trust by said Grinnan for her use and benefit; also the sum of ten thousand dollars due Dr. B. F. Chewning.

It being further understood and agreed that nothing herein contained shall be so construed as to require a purchaser from said Grinnan to look to the application of the purchase-money, or prevent said Grinnan giving a lien on said ——* property, or any part thereof. The balance of the proceeds of sale of said property

*Remaining. This word "remaining" is an omission in the copy copied from, and is to be printed on margin as explanation. See further on in record.

shall be held by said Grinnan for the use and benefit of said Mrs. Wm. King Smith, the wife of said Wm. King Smith, and subject to her disposal.

Witness the following signatures and seals:

(Signed) A. G. GRINNAN, [SEAL.]
WM. K. SMITH, [SEAL.]

A copy.

STATE OF VIRGINIA, }
City of Richmond. }

I, James Pleasants, a notary public for the said city in the State of Virginia, do certify that A. G. Grinnan and Wm. K. Smith, whose names are signed to the writing bearing date on the 29th day of October, 1857, have acknowledged the same before me in my said corporation.

649

Given under my hand this 29th Oct., 1857.

(Signed) JAMES PLEASANTS, *Not. Pub.*

Agreement.

This memorandum, made this 31st day of December, 1857, witnesses:

That whereas, certain creditors may endeavor, by suit or otherwise, to force a sale of the property conveyed in the deed mentioned in the foregoing agreement before the time specified in the above agreement, or may endeavor to secure their debts to the prejudice of other creditors of Wm. K. Smith: Now, therefore, it is agreed and understood between the said Smith and Grinnan that should any creditor endeavor to subject the property above named to the payment of his debt, or force a sale thereof before the time specified in the aforesaid agreement, that said creditor or creditors shall not be entitled to any of the benefits which might otherwise accrue to him or them under the aforesaid agreement, or to any of the rights and privileges of creditors named in the second classification of said agreement, it being the object of said Smith to gain time to allow a judicious sale of the property conveyed, and not permit any creditor to force a sale of the same so as to prejudice the interest of others.

(Signed) WM. K. SMITH. [SEAL.]
A. G. GRINNAN, [SEAL.]

MAY 13, 1880.

I do hereby certify that the above is a true copy of agreement of secret trust between W. K. Smith and A. G. Grinnan, and that I hold the original paper.

A. G. GRINNAN.

The Answer of A. G. Grinnan to the Rule Awarded Against Him at the — Term, 1880, of Fayette Circuit Court.

650 Answer of A. G. Grinnan.

To the hon. judge of the circuit court of Greenbrier Co., West Va.:

The answer of A. G. Grinnan to a rule against him, entered at the spring term of Greenbrier circuit court in 1880, in case of Grinnan *vs.* Long, &c.

The respondent, A. G. Grinnan, would briefly state, to the best of his knowledge and belief, that the affidavit of J. L. Marye, upon which the rule was entered, was not one made on his own knowledge but merely from hearsay and does not correctly represent the estate of respondent, for he holds a considerable amount of real estate in Madison Co., Va., not named by said Marye, besides a large amount of personal property; he holds also valuable and unincumbered real estate in other parts of Virginia; also valuable property in your honor's judicial district on Kanawha river, on Gauley river, also unincumbered, besides other interests and property in other States. J. L. Marye also makes an incorrect statement and one calculated unjustly to prejudice against the respondent in saying that he is well known as engaged in large mining speculations. He challenges him to name to your honor any mining property bought by him since the war. It is true that some five or six years ago he did buy some lands up Gauley — which have valuable coal on them, but respondent considered the land valuable for timber and in an agricultural view, and he could now sell the timber for about double the cost, and does not consider this a mining speculation. More than twenty years ago the respondent did buy and pay for mining property in Virginia, a part of which he sold at great advantage and holds a part now from which he expects to realize a large sum. He has been engaged to some extent in buying and selling mining property for others but not for himself, hence, perhaps, the origin of the incorrect statement in Marye's affidavit. The respondent is advised that he is not liable or security to any claim of near $9,000. The claim referred to was secured by
651 deed of trust given by the principal on real estate; and more than 20 years ago respondent, under the statute, gave written notice (the service of which is acknowledged) to make the debt or he would be no longer bound. The creditor did not make the debt, relying upon the deed of trust and other sureties, and respondent is advised by the best of counsel that he is not liable therefor. He also begs leave to controvert the statement of J. L. Marye that he represents $\frac{8}{10}$ of the claims against the trust fund. He hardly represents any creditors at all, for there is but little doubt that his client, B. F. Chewning, has been overpaid all that is due him or will be due him on a proper statement of his own claim, and that those claims he holds of others which were bought for a few cents on the dollar, said Chewning withholding from creditors, as he

hears, all knowledge of the security of the claims, so that there has been suit or suits to set aside assignments. J. L. Mayre does not represent the debt which respondent claims as trustee of Mrs. A. H. Smith. Respondent represents this debt himself, and this is by far the largest claim of any, and it is a question yet to be decided whether after respondent has collected this debt the proceeds thereof may not be properly claimed by a party named Owen, living in London. Besides, this respondent holds large claims of the 1st class against the fund, and at the urgent request of two creditors, the heirs of Thorn and Mrs. Manuel, respondent bought those debts, after fully explaining to the parties the state of the trust business as well as he could, and gave them about (as well as he can remember) twenty per cent. of face value, which is probably more than will be distributed. At the request of other creditors whose claims he knows to be just he overlooks their interest. While Chewning has been paid or overpaid, the claims above stated have not been paid, or only in small part. Thus your honor will see that the respondent or parties he represents will be entitled, as far as may now appear, to draw most of the fund now remaining, and it would be unnecessary to take it out of his hands even if the affidavit of Mayre was correctly stated. It is also possible that large sums of
652 the 1st class, and payable before any of Chewning's debts, may become due the respondent from breach of warranty, as stated in the bill of Grinnan *vs.* Long, and more especially in papers filed before the com'r, and ample funds should be left in his hands to secure him, for if the money is once paid out it will be impossible for him to be saved harmless from loss by reason of breach of Smith's warranty to him, and it is especially provided in the agreements of trust that all liability to the respondent are debts of the 1st class.

The respondent some time since discovered amongst his papers the agreement of secret trust made with Wm. K. Smith and executed and acknowledged on Oct. 29th, 1857, at the same time when the deed conveying property from Wm. K. Smith to the respondent to be held in trust was made. Your respondent is now advised that this secret agreement, made at the time the deed aforesaid was made, may be considered really as part of the deed and may control the distribution of funds to the exclusion of the 2d agreement, made in February, 1859, and recorded, and he is advised to refer the question to your honor, whether the secret agreement of Oct. 29th, 1857, made as stated, the original of which is herewith filed, marked Exhibit "X X," is not of superior validity to the one made afterwards in Feb., 1859, but recorded; that if parties acquired vested rights under the secret agreement of trust they could not be deprived of them by the recorded agreement afterwards made, and your honor will see in this secret agreement that the debt secured to B. F. Chewning was specifically stated as $10.000, and, if this secret agreement holds, that Chewning's secured claim cannot be allowed to exceed that amount, and that the commissioner's report allowing him as principal of his debt about $22,000 is altogether wrong, and your honor will even see this from the terms of the recorded agree-

ment of trust on file amongst the papers. There Chewning's debt is stated as $10,000 also, but with statement that true amount may exceed this.

Your respondent wrote both those agreements and is now, after mature reflection and reading the secret agreement aforesaid,
653 of opinion that Smith did not contemplate securing to B. F. Chewning more than $1,000 or $2,000 over $10,000 even in the 2d agreement, and, it must be clear to your honor, has never acknowledged any debt to Chewning of $22,000 as heretofore allowed him, and that therefore any debt of that size must be excluded from participation in the distribution, even if the 2d agreement controls, for this provides only for payment of acknowledged debts, and in two separate instruments of writing executed nearly two years apart he names $10,000 as the amount due Chewning, and therefore only acknowledges and secures that sum. The fact that report of commissioner in Chewning *vs.* Cowan allowing Chewning $22,000 was confirmed does not make much difference, for the bill of Grinnan *vs.* Long is of the nature of a bill of review, as a number of lawyers expressed the opinion that a settlement of accounts could not properly be made under orders in Chewning *vs.* Cowan, as that suit was to accomplish another object, and a settlement of accounts was lugged in as an afterthought. It will thus appear that Chewning's claims have been overpaid. In securing to Mrs. A. H. Smith the amount due her for relinquishment of dower the respondent explained to said Smith at the time the paper was prepared that a court of equity would not allow him to secure money to his wife to the exclusion of creditors unless he owed her, and that it would order a com'r to calculate and state the value of Mrs. Smith's relinquishments of dower, and the secret agreement of trust shows that $25,000 named as due Mrs. A. H. Smith was a mere supposed estimate. Smith never made or proposed to make to your respondent any calculation, and it is therefore proper that it should be referred to a commissioner to state and calculate the value of Mrs. Smith's relinquishment of dower, whether the same be larger or smaller than the amount named, so that the true amount be ascertained.

The respondent further states that it little becomes the said Chewning to ask for a rule against him, when he has advanced
654 him such large sums of money on his claim at his own risk, and so much that he believes on a proper settlement it will appear that his advances exceed the amount due him, and when the fact is well known that but for the large advances made by respondent to the trust subject, amounting at one time to five or six thousand dollars for taxes, payments, or liens, and other expenses, and his influence with his friend, G. B. Wallace, who held a lien on the most valuable part of the trust subject and who was very anxious to sell and realize his money (Chewning and other beneficiaries refusing all aid to your respondent), there would have been no fund for distribution. The success of respondent after many efforts in effecting a sale enabled him — save the property from further contingencies. A. G. GRINNAN.

Oct. 23, 1880.

ORANGE CO., *State of Va.*, } *To wit:*

This day personally appeared before me A. G. Grinnan, whose name is signed to the above answer, and, being duly sworn, made oath that the statements made therein are true to the best of his knowledge and belief.

Given under my hand this 23d day of October, 1880.

JOHN G. WILLIAMS,
Com'r in Chancery in Orange Cir't Court.

Exhibit "X X" referred to in the foregoing answer is the original paper of which Exhibit "C," filed with Tifft's petition, purports to be a copy, and upon comparison it is found to be a copy almost literally, and no material omission excepting in the line marked with * in the margin. The word remaining is in the original between "said" and "property." Exhibit "X X" is omitted.

J. MAYS, *Cl'k.*

655 *Affidavit of John L. Marye.*

In the fall of the year 1867 Dr. Francis B. Chewning, of Fredericksburg, Va., employed me as his counsel to look after his interests as a creditor of his father-in-law, Wm. K. Smith, secured in the deed of trust executed by said Smith to Dr. Andrew G. Grinnan as trustee, dated Feb. 12, 1859, conveying to him certain Loup Creek lands in Fayette Co., West Virginia, and the interest of said Smith in the Elk Ridge tract and the two Huddleston tracts in the Kanawha region. Dr. Chewning also employed me to look after the interests of his mother-in-law, Mrs. Abigail H. Smith, who was also secured as a creditor in the same deed. I had known all of the above-named parties well for twenty-odd years preceding—all had lived in Fredericksburg during this period except Grinnan, and he lived near by—both in their personal and business relations. William K. Smith had for thirty years preceding pursued the career of a bold and reckless speculator, chiefly in mineral properties, in various parts of the United States. He had, at several epochs in these speculations, encountered great vicis-itudes of pecuniary fortune, acquiring at times large sums of money and then losing all in speculative ventures. I was further cognizant of the fact that Dr. Chewning, who was at the time of his marriage in ample circumstances, had loaned to W. K. Smith, from time to time, all his means, and been thereby reduced to straightened circumstances. At said period, in 1867, Wm. K. Smith was advanced in years, in feeble health, and bankrupt in means. It was, therefore, of urgent importance to Dr. Chewning and to Mrs. Smith that their interests under said deed should be accurately ascertained and carefully watched and protected. Dr. Chewning explained to me, so far as he could, the character of the property and of the trusts in the deed, but in order that I might have a fuller and more exact knowledge it was arranged between him and Dr. Grinnan that the latter should

furnish me a full and exact statement of all the said trust property, its condition, probable value, and prospects of sale; also of
656 all the claims and charges against it; also of the several amounts of debts in each class secured on said deed of trust, as well as of all the transactions of said Grinnan in reference to the trust.

Dr. Grinnan and I met in the fall of 1867 for this purpose. My interview with him on this business was protracted during two days. His statement went into the details and minutia in all the above heads. I reduced his statement to writing, word for word, in his presence, as he made it to me. An exact copy of this writing is herewith filed, marked No. 1. It will be seen by reference to this writing that Dr. Grinnan then informed me, among other matters, as follows: First, that the object of the absolute conveyance in fee made by W. K. Smith, October, 1857, to Grinnan of the Loup Creek tract and of the interest of said Smith in the Elk Ridge tract and the two Huddleston tracts was to vest the title and control in Grinnan in order to enable him to sell and convey them. Secondly, that the trust deed of Feb. 12, 1859, declared the objects and trusts upon which A. G. Grinnan held said properties, and was conformed to and expressed the private understanding and agreement between Smith and Grinnan at the time of said absolute conveyance. Thirdly, that in this conference in the fall of 1867 A. G. Grinnan enumerated and described specifically to me, as counsel for F. B. Chewning and Mrs. Smith, all the charges and claims binding said trust subject which had priority and preference over my said clients to be as follows, viz: "1. Taxes for 1861 — 1866, $800.00, delinquent 15 January, 1866." "2d. Due A. G. Grinnan about $4 or 5,000 as trustee." 3d. Due Wallace lien about $3,000." Dr. Grinnan at this time gave me a copy of his stated acc't as trustee of his transactions with the trust, a copy of which is herewith filed, marked No. 2. In this interview Dr. Grinnan, after making this full and detailed statement to me, discussed at length the condition, probable value, and prospect of sale of the properties. Grinnan further expressed pleasure at the fact that I was the legal counsel and representative of the interest of Chewning and Mrs. Smith, because, he said, I, as
657 a lawyer, could more intelligently comprehend all the legal and business aspects of the trust and appreciate his acts as trustee in managing it and could aid him in explaining the title and true state of the property to persons invited and disposed to buy it. At the instance of Grinnan and Chewning I went with Grinnan to New York city in the winter of 1867–'8 and spent several days there with him in looking after some interests of Wm. K. Smith in Cincinnati, and in endeavoring to bring the Kanawha property before persons disposed to invest in such property. No results on either head were reached in this visit. From this time forward I was in constant, free, and intimate communication with Dr. Grinnan as to his transactions in regard to the trust. This intercourse was by personal interviews and by letters. It was constantly kept up because of constant pressure upon me caused by the solicitude of Dr. Chewning in behalf of himself and Mrs. Smith to

realize from their claims on the trust property on which they were actually dependent for sustenance. Nothing came out of efforts made to sell the property from time to time until the sale made in 187– to Long & Norris. Delays accrued in getting Long and Norris to pay up on their purchase caused by the Cowan claims and alleged deficiencies in area of land, &c. In the early part of 1872 some considerable payments were made by Long and Norris, viz., near $17,000, enough to enable Grinnan to pay off all he claimed as due him, either on account of any debt secured him in the deed of trust or for advances made by him as trustee, and to pay off to Cowan the $8,000 which had been agreed in compromise of his claim, and to pay something towards paying off the balance remaining of the debt to G. B. Wallace, and it was then confidently expected by Grinnan, Chewning, and myself that the large sum stipulated in the contract of sale to Long and Norris, viz., $10,000, to be paid in July, 1872, would soon be paid, and Grinnan thereby be enabled to pay off all of said balance to Wallace and have a surplus of trust funds in his hands applicable to pay quotas to Mrs. Smith and to Dr. Chewning. I met Dr. Grinnan,
658 by appointment with him, at his house, in Orange Co., Va., on the 17th day of July, 1872, for the purpose of inspecting and going over with him in detail all the items of his pecuniary transactions concerning the trust up to that time in order that he might settle his trustee account with Commissioner John A. Preston under any order to be obtained for that purpose made in the pending cause of Chewning, adm'r, *vs.* Cowan, &c., in circuit court of Fayette county, and in order to preparing the way for Grinnan to distribute the moneys coming to him from Long and Norriss among Mrs. Smith and Chewning and the other second-class creditors in the trust deed. During this last-mentioned interview with Grinnan he submitted to me an itemized account of all his pecuniary transactions as trustee, with his vouchers down to July, 1872. (This account embraced all the pecuniary transactions since the account, a copy of which is hereinabove referred to and exhibited.) I made during this interview in Grinnan's presence a copy of this account, together with certain notes of explanation as given to me then by Grinnan, and also took down from him a memorandum in writing, setting forth how much would remain of the sale moneys applicable to the claim of Mrs. Smith, Dr. Chewning, and others, second-class creditors, after every other prior claim and demand in the trust of every kind was fully met and paid off. (A copy of the said account and of said memorandum in writing so furnished me by Dr. Grinnan is herewith filed as Exhibit No. 3.) It will be observed by inspecting this trust account and these memoranda in writing of the facts as laid before me by Dr. Grinnan that the following was the state of the trust account and of all remaining charges on the trust subject down to 15th June, 1872, viz: That Grinnan had collected in 1872 from Long and Norris and from sale of some farming rights on the lands $16,985.00, which being applied to all the debits against the trust (embracing the debt of W. K. Smith to him of $457

named in the deed and interest thereon) left a balance as due
659 Grinnan by the trust of $636.68 as of June 15th, 1872, and the said memoranda shew- that Grinnan then stated that the only remaining preferred charges on the trust subject were as follows, viz: First, $4,612.74 as due to the G. B. Wallace debt, calculated down to June 12th, 1872 (subject to a deduction of ½ of $505.80, being the 12 per cent. interest allowed in that statement, if Wallace would consent to take six per cent.); and, secondly, ten per cent. on $43,127.76. or $4,312.77, as due Mrs. Abagail H. Smith in her contract for commutation of dower in the realty of the trust subject; and, thirdly, the commission of Grinnan as trustee on the moneys to be thereafter received by him from proceeds of the subject, so that when these three prior claims were satisfied the residue of the moneys coming to Grinnan from proceeds of the trust subject would be applicable to pay ratably the claims of Chewning and Mrs. A. H. Smith and other second-class creditors, and that in order to enable me, as counsel, to form an approximate judgment of how much would be so applicable to said second-class creditors he gave me in this interview a statement of what the two Huddleston tracts would realize and what ought to be expected to come in from sales of some farming rights granted on the Loup Creek tract. During this interview Grinnan consulted with me as to what commission he was fairly entitled to claim for his services as trustee; rehearsed all the time and trouble and skill laid out by him upon the care of the trust property, as well as all the money he had advanced from time to time to protect the trust property, and submitted to me whether I, as counsel for the parties owning so large an interest in the trust subject, did not think he was fairly entitled to a commission of ten per cent. on the moneys received from proceeds of the trust. I told him that I thought he could fairly charge and be allowed ten per cent. for commission. At this interview it was arranged between Grinnan and myself that steps should be taken to procure an order of Fayette Co. circuit court in said chancery cause directing Commissioner Preston to state and settle the trust account, to publish notice to all creditors of the trust to present their claims, and to ascer-
660 tain and report the debts entitled to participate in the trust fund and their respective dignities. Considerable delay occurred in having this order made and executed, but in the fall or early winter of 1873 I went with Grinnan, by appointment, to Lewisburg, and we appeared before Com'r Preston. Grinnan laid his itemized account and vouchers before him, and I submitted the evidences of the claims of Mrs. A. H. Smith and of F. B. Chewning (the latter then holding, besides his individual debt mentioned in the trust deed, a considerable amount of other second-class debts of W. K. Smith, which had been assigned to him). From these statements and evidence Com'r Preston stated and returned the report in the cause reported by him in February, 1874, which account and statement of the trust assets and of the liabilities and the respective amounts and priorities will be found in all respects conformed to the statements hereinbefore recited as laid before me by Grinnan. All the information and evidence on which this report was based was

furnished to Com'r Preston by Grinnan except the evidence as to the claims held by Chewning, and this evidence was submitted to the com'r in the presence of Grinnan and approved by him. Inasmuch as it was made clear by the trust account and statement so furnished me by Dr. Grinnan and laid by him before Com'r Preston that the aforestated preferred debts were all ascertained and exactly estimated as to their amounts, and that the payments due by Long and Norris, viz., $10,000, with interest from Jan'y 30, 1872, due July 21, 1872, and $11,175.00, with interest from Jan'y 30, 1872, due July 21, 1873, would pay and discharge all the preferred debts and leave a large surplus for distribution between Mrs. Smith and F. B. Chewning and the other unpreferred creditors (while the residue of purchase-money payable by Long and Norris, viz., $11,175.00 and interest, due Jan'y, 1874, and $15,000.00 and interest, due July, 1874, would constitute a large fund for like distribution), it becomes a matter of large pecuniary interest to Chewning and Mrs. Smith,
who together owned nineteen-twentieths of the unpreferred
661 debts, that Grinnan should press energetically for the payments from Long and Norris. This matter was the subject of frequent consultation and communication between Grinnan and myself, and when delays and obstacles occurred in exacting the payments from Long and Norris, Grinnan proposed to me in 1873, and repeated the proffer in 1874 and 1875, that Mrs. Smith and Chewning should consent to an order of court authorizing Grinnan to assign and turn over to the unpreferred creditors the remaining unpaid installments of purchase-money due by Long and Norris and thereby enable Grinnan to wind up and finally close his trusteeship. In this connection he urged Chewning to agree to buy the Huddleston tract of 125 acres at what he stated was a reasonable market price, viz., ten or twelve thousand dollars—the exact amount not now remembered—because Chewning would only have to pay for Grinnan's half of it, as Chewning and his mother-in-law, Mrs. Smith, represented as creditors virtually nearly all of the other half. This mode of closing up Grinnan's connection with the trust property did not approve itself to Chewning or to myself, who regarded it as the duty of Grinnan to attend to winding up the trust. Grinnan's desire thus to close up the trust is shown by a letter to me of Nov. 16, 1873 (exhibit), and it is also referred to — another letter of Jan'y 17, 1877 (exhibit). During 1873 and 1874 obstacles and *and* delays occurred in obtaining further payments from Long and Norris; but in the year 1874 some additional moneys were collected, and Grinnan paid over to me in Jan'y, 1875, two thousand dollars on account of Mrs. Smith's claim and three thousand on account of F. B. Chewning's claim. He collected further payments from Long and Norris in 1875 and paid over to me in Jan'y, 1876, thirty-five hundred dollars on account of Mrs. Smith's claim and thirty-five hundred dollars on account of Chewning's claim. Grinnan received the residue of the purchase-money from Long and Norris in 1876 and in Jan'y, 1877, and in the latter month he paid over to me two thousand dollars on account of Mrs. Smith's claim

and four thousand dollars on account of Chewning's claim.
662 These large payments in 1875, 1876, 1877 were made to me for Chewning and Mrs. Smith in personal interviews between myself and Grinnan, and were made by Grinnan on the basis that the exact status of all the preferred debts was ascertained and reported in the said cause, and that all said payments could be safely and ought to be paid to Chewning and Mrs. Smith after Grinnan had collected all the purchase-money from Long and Norris (which occurred late in 1876 or early in 1877). He informed me that he could not, in his judgment, proceed further in the distribution of the trust funds to Chewning and Mrs. Smith and the other unpreferred creditors because—

1st. He was not satisfied that the pending suit in Fayette circuit court and the orders and settlements of account and reports made therein constituted a complete protection to him as trustee in making final distribution of the trust funds thereunder.

2d. Because suits were pending on complaints for deficiency in the area of the Forest Hall property sold by him as trustee and for a right of way through the 5,000-acre tract of Elk Ridge, the results of which suits might lead to pecuniary reclamations upon him. No other grounds for delaying final distribution of the trust funds were stated or alluded to by Grinnan.

To meet the (1st) first ground of delay it was arranged and understood between myself and Grinnan that he should proceed as expeditiously as possible to consult such counsel as he chose, and if they deemed it necessary for his protection as trustee that new or amended pleadings should be instituted in Fayette court and orders and accounts and reports had thereunder; that no time should be lost in having all this done. Very great and, as appeared plain to Chewning and myself, very needless delays occurred on the part of Grinnan in performing his pledge and his duty in this regard. We both from time to time urged progress upon him in a matter so grave. It was not until — of ——, 187–, that the amended
663 bill was filed, nor was it until the 4th day of April, 1879, that the order was made in the amended pleadings directing Com'r Preston to cite, by publication at Lewisburg and Fredericksburg, all creditors of the trust to appear before him and prove their claims, and for Grinnan to make further settlement of his trust account before said com'r. After this order was obtained Com'r Preston obeyed it by giving the required notices, which called for the creditors and Grinnan to appear before him on the — day of June, 1879. I urged Dr. Grinnan to have all his statements ready before the com'r, so that the latter could execute the order and make report in time for action thereon by the court at the March term, 1880. Dr. Grinnan failed to lay his statements before the com'r in time for the latter to complete his report within the 30 days prescribed by law; but Com'r Preston furnished his report as soon as he could and returned it to court. It will be seen by inspecting this report that the account of all the preferred debts against the trust is identical with that hereinabove recited and the same as the statement made to me by Dr. Grinnan in 1867 and in July, 1872, and laid by

him before Com'r Preston in the fall of 1873, and contained in his report of Feb'y, 1874, and the same with that acted on by Grinnan and myself in all our frequent interviews and consultations about the trust matter down to March, 1880, as hereinbefore set forth. During all this protracted intercourse and continuous communication between Dr. Grinnan and myself in regard to the condition, liabilities, and settlement of the said trust I never had any intimation from him or from any source of his having any claim or right against the trust property or against Wm. K. Smith, except the claims hereinabove specifically designated. I was, therefore, greatly surprised to see from a copy of his recent petition filed in said case that he was setting up the claim mentioned in that petition.

Witness my hand this 30th October, 1880.

JNO. L. MARYE.

664 STATE OF VIRGINIA, *Corporation of Fredericksburg,* } *To wit:*

Personally appeared before me, a justice of the peace for said corporation, John L. Marye, whose name is signed to the foregoing statement in writing, and made oath that the matters therein stated as of his own knowledge are true, and those stated on information of others he believes to be true.

Witness my hand this 30th October, 1880.

MO. A. ENGLISH, *J. P.*

Exception endorsed:

Exception.

This affidavit and all the papers, exhibits, copies of letters, and statements filed therewith are excepted to. They are wholly inadmissible as evidence in any view which can be taken of these cases.

DENNIS & PRICE,
For Pl'ff Grinnan.

Nov. 9, 1880.

EXHIBIT No. 1, Filed with the Foregoing Affidavit.

EXHIBIT No. 1.

Copy of Statement Made by A. G. Grinnan to J. L. Marye in the Fall of 1867.

In Oct. 29, 1857, Wm. K. Smith (Mrs. S. not joining) made the absolute conveyance of the 35,000 acres on Loup creek and the Elk Ridge property of 7,000 acres, &c., to Andrew G. Grinnan. This conveyance was for the purpose of vesting A. G. G. with absolute title and control for purposes of sale, but rested on certain trusts expressed in private papers passed between them.

Octo. 1, '57, W. K. S. and wife had executed — deed of trust on 12,000 acres (the most valuable part) — Jas. S. Wallace to secure a

debt of 6 or $7,000 to G. B. Wallace. There remains some 2 to $3,000 due on this.

The legal title to the 7,000 — Elk Ridge tract was held by Wm. H. Edwards in 1857, to whom Smith owed a considerable
665 sum on the purchase of it from Edwards, and Edwards still held the legal title on account of unpaid installments. Smith got the money from G. B. Wallace to pay for the Elk Ridge tract.

Edwards and wife by deed, Octo. 7, 1857, conveyed to W. K. S. 5,000 acres of the Elk Ridge tract. W. K. S. and wife, of same date, gave deed of trust to John H. Platt, trustee, to secure $8,417.20 to Wm. H. E., bal. of purchase-money due on the 5,000 acres of Elk Ridge.

Edwards and wife by deed about the same time conveyed 2,000 acres of Elk Ridge tract (this 2,000 called Forest Hill) free of encumbrance to W. K. S.

W. K. S. and wife conveyed to A. G. G. ½ of this 2,000 in fee in his individual right.

W. K. S. held a contract (assigned to him by W. H. Edwards) for 200 acres which Geo. P. Huddleston had made to convey same to Wm. H. E. This 200 were for a frontage for the Elk Ridge tract to the Kanawha. One ½ of this 200 *were* held by A. G. G. in fee.

A. G. G. as trustee paid up all the balance of purchase-money due on the Huddleston tract (about 12 or $1,500), and in Oct. 27, 1860, G. P. Huddleston and wife made absolute deed for same to A. G. G. for same, ½ in his individual right and ½ as trustee for W. K. S.'s creditors.

There were 15 acres adjoining the Huddleston tract conveyed Oct. 1, 1857, by Wm. H. Edwards to W. K. S.

February 12th, 1859, was made the trust agreement signed by A. G. G. and W. K. S., setting forth the objects of the absolute deed to A. G. G. of Oct. 29, 1857, viz., that A. G. G. was a trustee of the lands thereby conveyed, 1, to secure by preference certain moneys due by W. K. S. to A. G. G. as guardian and in his own right, amounting then to about $4 or 500 individually and some $8 or 900 due him for his ward; also all necessary expenses to be incurred by A. G. G. in executing the trust; 2, then such debts as said W. K. S. should state in writing to be justly due by him, including a debt declared in the agreement of $10,000 to Dr. F. B. Chewning,
666 and then a claim of Mrs. W. K. S. (which Smith insisted on) of $25,000 on acc't of previous relinquishments of dower in previous sales of realty. This $25,000 was to be held by A. G. G. as trustee for Mrs. S.

It was stipulated in this agreement that A. G. G. should have full power to sell the subject by public or private sale to make compromise of all matters affecting title, &c., exchange for other real estate, &c.

In June, 1859, as trustee of W. K. S., A. G. G. entered into agreement with Mrs. S., signed by W. K. S. and her, agreeing that A. G. G. should receive and hold 10 per cent. of all proceeds of sales of

trust subject for Mrs. S. in consideration of her relinquishing dower to this trust realty. (Not certain, but think this was recorded.)

In June, 1859, A. G. G., as trustee and in his own right (W. K. S. and wife joining), sold Forest Hall, including 100 acres of Huddleston tract, to "the Forest Hall Coal and Mining Co." for part cash, part individual notes, and balance in bonds of the Co. The cash and individual notes, A. G. G. thinks, realized about $10,000. The bonds amounted, he thinks, to about $20,000. The bonds were sold in 1860 by A. G. G. for 60c. on the dollar (apprehending the political troubles). As trustee of Mrs. S., A. G. G. has paid her nearly all of her 10 per ct. of this fund. As trustee for Wm. K. S., A. G. G. settled with W. K. S. his trustee acc't in 1866, and this acc't has been settled by a com'r in Fayette Co. and recorded. ½ of all the funds arising from the Forest Hill sale have been accounted for by A. G. G. as trustee and appear in said trust acc't.

In 1860 Platt, as trustee of W. H. E., sold the remaining 5,000 acres of Elk Ridge. A. G. G. enjoined the sale and instituted proceedings in marine court, N. Y., against Wm. H. E., which resulted in enforcing Wm. H. E. to give A. G. G., as trustee of W. K. S., a new title bond to the Elk Ridge property. A. G. G., as trustee, paid $3,000 to Wm. H. E. on this new arrangement, W. K. S. giving his individual notes for 6 or $7,000, the balance secured in this 5,000 acres, as mentioned in this title bond.

667 In 1864 Wm. H. E. got a decree in circuit court of Kanawha, under which a com'r sold out this 5,000 acres, and W. H. E. bought it in, and court confirmed the sale, and deed from com'r passed to W. H. E. (A. G. G. is now endeavoring to arrange for proceedings to amend this result as worked by W. H. E.)

Memo. of Points for Annulling this Sale.

1. The papers in Kanawha shew an error in the statement of the com'r in the case in this: that there is really due to A. G. G. as trustee about $1,200 more than is allowed by the com'r.

2d. Com'r to sell gave no bond, as decree directed.

3d. Com'r required no bond or security of purchaser, as decree directed.

4th. Com'r reported that W. H. E.'s claim absorbed all purchase-money. This is error. See (1) above.

5th. Inadequacy of consideration. (Time unsuitable.)

6th. Contract in title bond gave A. G. G. right to personal notice of enforcement by W. H. E.

7th. Intervention of war.

Whelan's heirs claim that a contract was made about a year or two before the war by W. K. S. with Allen T. Caperton, A. H. H. Stuart, and —— ——, att'y for heirs of Dennis Whelan, stipulating that they should enter W. K. S. as a defendant in the U. S. district court at Lewisburg at their suit as pl'ff, in which a decree should be entered in favor of W. K. S., concluding their claims to the Fayette Co. lands and binding the pl't'ff to get releases from all the indi-

vidual heirs. W. K. S. gave his note for $2,500 as the consideration for this. The decree was to be unconditional.

There now stands out as charges on the Fayette Co. property—

1. Taxes for 1861, 1866, $800 odd, delinquent 15 January, 1866.
2. Due A. G. G. about 4 or $5,000 as trustee.
3. Wallace's lien, about $3,000.

668 (Whelan's.)

4. $4,000 due Randall, secured by a deed of trust executed by W. K. S., on Elk Ridge, in 1865. Wm. H. Field, trustee.

(Of course W. K. S. had no right or title to make such a deed.)

Endorsed: See exceptions endorsed on Mary-'s affidavit.

* * * * * * *

Copy of Exhibit No. I I, Filed with Affidavit of John L. Marye.

EXHIBIT No. I I.

Account of A. G Grinnan, trustee of Wm. King Smith.

1859.	1. June, cash p'd Wm. McKeney	$100 00	
	2. June, cash p'd Wm. McKeney to prepare papers	20 00	
	3. Taxes on land in Fayette Co. for 1858	89 94	
	4. July 1, G. B. Wallace on bond	3,000 00	
			$3,209 94
	5. July 18, G. P. Huddleston on land	$715 00	
	6. A. G. Grinnan, trustee for Mrs. A. H. Smith, for release of dower	428 92	
	7. Dec. 20, Patton & Brown, atty's' fees	42 00	
	8. Dec. 31, W. H. Edwards on Elk Ridge tract	400 00	
	9. Dec., G. P. Huddleston on land	350 00	
			$1,935 92

669

1860.	10. March, A. G. Grinnan, expense to New York in suit *vs.* Edwards	35 00	
	11. Woodbury & Churchill, fees, &c., suit	100 00	
	12. James Middleton, fees in s'd suit in Va	20 00	
	13. G. P. Huddleston on land	100 00	

	14. ½ discount on notes of Hale, Bailey & Rosenmills	125 00	
	15. 10 per cent. commission on $4,791.70	479 17	
			$859 17
			$6,005 03
1859.	By net am't rec'd in cash and notes, less expenses Forest Hill sales (of the ½ or trustee)	$4,289 26	
Dec. —.	By coupons of Forest Hill bonds	240 00	
1860.			
June —.	By 17½ coupons of Forest Hill bonds	262 50	
			$4,791 76
1860.			
June —.	Balance due to A. G. Grinnan		$1,213 27
1860.			
June —.	To balance due to A. G. Grinnan	$1,213 27	
	17. ½ Grinnan's expenses to N. York	17 00	
	18. G. B. Wallace on bonds	2,000 00	
	19. Aug. 13, Grinnan, guardian of Conway	892 13	
670	20. Aug., expenses of Grinnan to New York	35 00	
			$4,157 40
	21. Sept., expenses of Grinnan to Philadelphia	$25 00	
	22. G. P. Huddleston, bal. on land	311 00	
	23. A. R. Blakey, fee for advice and papers	10 00	
	24. E. B. Bailey, fee in suit *vs.* Edwards	25 00	
	25. J. B. Jones, clerk of Fayette	18 50	
			$389 50
	26. Taxes paid in July	$90 58	
	27. Woodbury & Churchill, att'y fees	45 00	
	28. W. H. Edwards, under compromise about Elk Ridge	3,004 00	
	½ Rosenmills' bill for engrossing bonds	10 50	
	Int. on bal. due A. G. Grinnan	72 79	
	5 per cent. com. on $5,147.50	257 37	
			$3,480 24
			$8,027 14

CR.

1860.			
Aug. —.	By cash rec'd for 16 Forest Hill coupon bonds at sixty cents on the dollar	$4,800 00	
	½ of 3 coupons of bonds	22 50	
	½ amount of Mrs. A. H. Smith, for 3 Forest Hill bonds, nominal value $500.00 each	325 00	
			$5,147 50

671

1861.

June —. Due to A. G. Grinnan on trustee acc't $2,879 64

This is exclusive of a debt secured by the trust agreement,* errors excepted.

A true statement.

A. G. GRINNAN.

(*This debt, viz., $457.00 and int. from 10th Feb'y, 1857, paid and charged up June, 1872, on A. G. G.'s. trust acc.) This item is added in pencil and pointed by *.

J. MAYS, *Cl'k.*

Endorsed: See exceptions endorsed on Marye's affidavit.

Copies of Letters of A. G. Grinnan to J. L. Marye.

Letters.

ORANGE C. H., VA.

John L. Marye, Esq., Fredericksburg, Va.

DEAR SIR: I returned a few days since from my trip to Philadelphia and New York. I collected the balance due on Loup Creek, and hearing you were in Richmond, intended leaving for that point to-day. I shall leave to-morrow unless some unfor-seen accident prevents, and stop at the Park hotel. The Forest Hill owners have a suit on hand for what they claim to be a part of their tract, and I am notified that if they fail, they propose coming back on me. The suit is not yet decided, and the amount of reclamation, if any, I cannot yet ascertain. It is land near the front, and they would endeavor to put a high value on it. In selling Forest Hill to them the right of way through the Elk Ridge tract was granted them. If Norris and party lose the Elk Ridge tract, as it seems probable they will, the Forest Hill people will hold me liable for breach of warranty on this point, and come back for costs for forcing a road through
672 Elk Ridge, which would be heavy; their back lands would be of no value without this road. I endeavored to settle the Armstrong Creek tract to them and close up the whole matter, making them give me a full release, but did not succeed. Went to New York hoping to do this. I have probably sold the Armstrong Creek

tract to another party, and hope to ascertain in a few days. It is a pity Dr. C. and Mrs. S. did not take it. I ask $13,000 for the tract, and ½ of — belongs to the trust fund, ½ cash, balance — one, 2 and 3 years, with interest. * * *

I directed Governor Price to procure a decree for an account at last August court and order of publication in Fred'b'g paper, but no court was held. A decree cannot be had until last of March. I do not know what claims will come in under the extended order of publication or what claims will be allowed. I could not pay on claims not allowed, and it is a matter of difficulty to me what estimate to make. If you will meet me in Richmond, we will confer on these matters.

Very truly yours, A. G. GRINNAN.

Wednesday, Jan'y 17, 1877.

(Copy. Brompton.)

MY DEAR SIR: I was especially anxious to go to Lewisburg early next week so that I could go to Synod also, but Mr. Long writes me that sickness in his family prevented his going to Philadelphia this week, and that he will go next Monday. I am desirous of seeing him. I propose fixing my account so as to show all the first-class debts, either paid or stated, and the remainder of assets under my control will be applicable to the creditors of Wm. K. Smith secured under the deed of trust, and a decree can be asked for at next court authorizing *pro rata* payments or transfer of bonds in settlement of debts, and will enable me to secure an earlier closing of my troublesome trust. * * *

Yours very truly, A. G. GRINNAN.

Nov. 16, '73.

673 Endorsed: See exceptions to these copies endorsed on the affidavit of J. L. Mayre.

Copy of Trust Acc't of A. G. Grinnan to 15 June, 1872, Exhibit No. III, Filed with Affidavit of J. L. Marye.

EXHIBIT No. III.

A. G. Grinnan, trustee, under deed of trust from Wm. K. Smith.

Balance due A. G. Grinnan, trustee, June 15, 1861, as per settlement made and recorded			$2,879 64
1866.	Int. to June 15, 1866		$863 90
1866. March	—. Expenses to Kanawha C. H. on matter of suit of W. H. Edwards	$65 00	
"	—. Cash to Slack, clerk of court, copy of record, suit of Edwards	7 50	

		Expenses from Keokuk, Iowa, to New York on telegram from Wm. K. Smith as to alleged sale by W. K. S.	85 00	
		Principal of am't due June 15, 1866	$3,037 94	
		Int. on same to June 15, 1867		182 28
1866.				
Nov. and Dec.		Expenses to New York to sell land, over one month in N. Y.	160 00	
674				
1867.		Cash to J. G. Hunt, acknowledgment of papers	2 00	
Jan. and Feb.		Expenses to New York on negotiations to sell land and troubles with J. F. Cowan	160 00	
June	—.	Fee — counsel (Churchill & Woodbury)	25 00	
"	—.	Expenses to New York and to West Va.	91 00	
		Amo. of principal due 15 June, 1867	$3,475 94	
		Int. on same 1 year to June 15, 1868		207 56
1868.				
January	—.	Expenses to Washington to see J. F. Cowan	17 00	
May	—.	Expenses to Baltimore to sell land	20 00	
			$3,512 94	
		Int. on same to 15 June, 1869		210 78
1868.				
December	—.	Expenses to West Va. about lands and suits	60 00	
1869.				
April	—.	Expenses to New York	45 00	
1869.				
May	—.	Expenses to Fayette Co. with New York capitalists	70 00	
May	—.	Cash p'd Thos. Robertson as agent and surveyor	39 00	
675				
May	—.	To open coal banks	20 00	
"	—.	Cash paid recorder Fayette Co.	4 00	

May	—. Cash paid collector Falls township taxes	75 19	
"	—. Cash paid editor Lewisburg Journal	17 90	
		$3,844 03	$1,464 52
1869.			
May	—. By cash of Robert Ingram on acc't sale farm rights	$11 00	
	By cash of J. G. McKenny on acc't of sale of farm rights	29 10	
	By cash of Henry Light on acc. of do	174 00	
		$214 10	
	Aggregate of int.	$1,464 52	
	Deduct credits on above	214 00†	
	Bal. of int. acc.	$1,250 52	

† Slight error of 10 cents.

(Trust acc't of A. G. G. continued.)

	Balance of interest to 15th June, 1869		$15,502 52
1869.	Balance of principal	$3,844 03	
	Int. on $3,844.03 to 15th June, 1870		230 64
Aug.	—. Expenses to White Sulphur at suggestion of Dr. Chewning to see Gov. Clymer, Peabody, &c.	35 00	
676			
1870.			
Feb.	—. Expenses to New York to sell lands, 10 d's	75 00	
	Clerk of Orange, acknowledgment and seals to deeds	3 50	
Ap'l	—. Expenses to Philadelphia to meet J. F. Cowan	15 00	
May	—. Expenses to Baltimore to sell lands, to confer with Long and Norris	15 00	
		$3,987 53	
	Int. 1 year to 15th June, 1871		$239 25
1870.			
July	—. Cash paid State taxes on Loup Creek	487 16	

	½ taxes on Armstrong Creek tract	15 12	
	County taxes on both tracts	410 00	
Aug.	—. Expenses to Baltimore as to lands	15 00	
		$4,914 81	
Nov.	—. Expenses on trip with Mr. Long to see Cowan	35 00	
	Expenses to Balt. to see Long and Norris	15 00	
	Cash p'd Marshall & Dallanm, att'ys' fees	100 00	
	Cash p'd to F. H. Churchill, att'y, N. York	20 00	
	Cash paid to J. C. Long, his expenses to N. Y. and West and on errand to arrange Cowan suit	275 00	
1871.			
Feb.	—. Expenses Balto. to see Long and Norris	25 00	
677			
Mar.	—. Expenses to Balto., Trenton, and New York on negotiation with Long and Norris	60 00	
	Cash p'd Thos. Alexander, att'y, New York	50 00	
	Cash p'd Sam'l Price, att'y, West Va.	100 00	
	Cash p'd John Swan, att'y, Charleston, and suit to Edwards for deficiency in *Lump* Creek	100 00	
	Edwards' *set up* written release from Wm. K. Smith		
	Expenses to Lewisburg to see Sam'l Price, att'y	23 00	
		$5,717 81	
	By aggregate of int. to June 15, 1871		$1,720 41
	By amount of taxes refunded by order of county court of Fayette Co. on acc't of excess of taxes paid in several years	$462 70	
	Aggregate of int. to 15 June, 1871		$1,720 41
	Deduct amo. of credit for taxes refunded		462 70
	Net bal. of int. 15 June, '71		$1,257 71

(Trust acc't of A. G. G. continued.)

		Am't of principal bro't over--	$5,717 81	
1871.				
April	—.	Am't paid G. B. Wallace on acc't debt	500 00	
			$6,217 81	
678		Am't of interest bro't over		$1,257 71
		Int. on $6,217.81, 1 year to 15 June, 1872		373 07
1871.				
Aug.	—.	Cash paid Marye and Fitzhugh, taking depositions	20 00	
		Cash paid J. M. Blume, c'nty tax	12 05	
		Cash paid clerk Fayette Co., cop's of records	39 87	
		Cash paid J. M. Blume, recorder fees	22 70	
		Cash paid Thos. Garner, att'y fees	50 00	
1872.				
Feb.	—.	Cash paid expenses to Balto. and Trenton, 31 days, in negotiations with Long & Norris	175 00	
		P'd Latimer, acknowledgm't of papers	6 00	
		Revenue stamps on deeds to Long & Norris	64 50	
		Cash paid Long & Norris to effect the compromise with J. F. Cowan	8,000 00	
		Paid H. B. Dallanm, costs taking depo.	5 90	
		Paid Dr. F. B. Chewning	100 00	
		" Mrs. A. H. Smith	50 00	
		P'd for delinquent taxes to J. M. Blume	317 90	
May	—.	Expenses to West Virginia	40 00	
June	—.	½ cost of executing deed to Ches. & Ohio R. R. Co., right of way thro' Armstrong Creek tract	1 16	
			$15,122 89	$1,630 77
679		Amo. due A. G. Grinnan on acc't preferred debt secured on deed trust	457 00	

	Int. on $457.00 from 10 Feb'y, 1857, to 15 June, '72, 15 yrs. 4 months		420 82
	Amo. of principal	$15,579 89	$2,051 79
	Amo. of int. to June 15,1872	2,051 79	
	Amo. of debits, trust acc't	$17,631 68	
1872.			
Jan'y 30.	By amo. of Long & Norris, cash payment on sale to them	$4,400 00	
Feb'y, March, Ap'l, May.	By do. of Long & Norris	11,250 00	
May —.	By cash of Long & Norris, advanced on their bond due in July	1,000 00	
	By cash received from J. M. Blume on acc't of sales of farming rights	100 00	
	By cash of Ingraham for do	85 00	
	By ½ of amo. paid by Ches. & Ohio R. R. Co. for right of way through the 125 acres on Armstrong creek	150 00	
		$16,985 00	

Endorsed: See exceptions endorsed on Mayre's affidavit.

Credits on trustee acc't to May, 1872	$16,985 00
Debits " " June, "	17,621 68

This includes debt of $457.00 due A. G. Grinnan, secured in trust deed of Feb'y 10, 1859, and int. to June 15, 1872.

The above credits are—

680

1872.		
Jan. 30.	Cash of Long & Norris for cash pay't	$4,400 00
Feb'y, March, April, and May.	Cash of do	11,250 00
	Cash on bond in July	1,000 00
	And cash from Mr. Blume on land sales in Fayette	100 00
	Cash sales in Fayette, Ingraham	85 00
	½ cash of Ches. & Ohio R. R. for right of way through land below Armstrong creek	150 00
		$16,985 00

There remains due on preferred debt in deed of trust, viz:

1857.		
Oct. 1.	Amo. loaned by Wallace	$6,464 00
1859.		
July 1.	Int. accrued to date	678 72
		$7,142 72
	Then paid	3,000 00
		$4,142 72
	Int. to Aug. 12, '60	277 66
		$4,420 28
	Then paid	2,000 00
		$2,420 28
	Interest to April 12, 1871	1,549 98
		$3,970 26
	Then paid	500 00
		$3,470 26

Wallace claimed 12% after new constitution of Va. allowed it, as terms of forbearance. Grinnan was forced to agree to allow it to prevent foreclosure. The above calculation is — a basis of 6%.

681 *Statement of Terms of Sale of Loup Creek (or Wilson's Survey.)*

A. G. G. had the Wilson tract (calling for 35,000 acres) surveyed by a competent surveyor, Robertson, and this survey ascertained the quantity to be 20,000 acres and interest in Elk Ridge in suit *vs.* Edwards.

1872.		
Jan. 30.	Sale to S. C. Long and G. D. Norris, of Balto., for	$63,000 00

They have resold to sundry parties.
Paid $4,400.00.
" 11,250.00.

Due July 21, 1872, bond		$10,000 00
	And int. from Jan'y 3, '72. (Paid on this $1,000.00.)	
Due July 21, 1873, bond		11,175 00
	And int. from Jan'y 30, '72.	

Due 3 bonds, due July 21, 1874, for $5,000 each		15,000 00
And interest.		
1 bond due Jan'y, 1874		11,175 00
And int.		
		$47,350 00
Off advance of		1,000 00
		$46,350 00

And int. to July, 1872, from Jan'y, 1872—say 6 mos.

Rough estimate carried forward:

Debits on trustee acc't to June, 1872		$17,621 68
Credits " " " " "		16,985 00
		$636 68
Balance of debits		$636 68
Balance due Wallace April 12, '71	$3,470 26	
Int. to June 12, '72—say 12%	505 80	
	$3,976 06	
		$3,976 06
		$4,612 74

If only 6% ch'g'd, deduct ½ of $505.80.

682 One-half of the Huddleston lands, which were for frontage to "Elk Ridge" and Forest Hall, was sold as appurtenant to Forest Hall. The other half *of*, or about 125 acres, did not go under the Elk Ridge tract, and therefore still remains for sale—*i. e.*, one-half of this 125 — belongs to the trust. This, Dr. G. thinks, can be sold at $50 per acre, the fee simple to which is owned by the trust estate. This ½ of 125 acres and the farming rights to two small tracts, the title to which have fallen in by failure of parties to pay for farming rights to same—one of about 25 acres, the other of 50 acres—remain for sale as to farming rights.

Mrs. A. H. Smith, by her written contract dated 30 April, 1867, drawn by J. L. Marye, Jr., with A. G. Grinnan, agreed to commute her dower in the realty conveyed by the trust deed of Feb'ry 10, 1859, by receiving 10 % of the net proceeds realized from trust sales. This deed confirmed her contract to same effect made June, 1859. These net proceeds will be approximately—

Sale money, if estimated as cash, July 21, 1872, would be	$46,350 00	
And int., say 6 mos.	1,390 50	
		$47,740 50
Deduct amo. of preferred debts as above		4,612 74
		$43,127 76

Off commissions of A. G. Grinnan, trustee.

Endorsed: Memo. of notes taken as to state of trust acc't of A. G. Grinnan, shewing approximate result of trust assets made July 17, 1872.

Exhibit No. III filed with affidavit of John L. Marye, Oct., 1880. See exceptions endorsed on Marye's affidavit.

Affidavit of F. B. Chewning.

In the fall of the year 1867 I employed John L. Mayre, of Fredericksburg, Va., as counsel for myself and my mother-in-law, Mrs. Abigail H. Smith, to look after my interests as a large cred-
683 itor of Wm. K. Smith and those of Mrs. Smith, under the absolute deed of October, 1857, and the deed of trust, Feb'y 12th, 1859, made by Wm. K. Smith to Andrew G. Grinnan, trustee, conveying to the latter the Loup Creek tracts and the interest of said Smith in the Elk Ridge tracts and the Huddleston tracts in the Kanawha valley, West Va.

Having during a long period of time theretofore loaned to Wm. K. Smith from time to time many thousand dollars and been thereby reduced to poverty, it was of the utmost consequence to me that the interests of myself and of Mrs. Smith (who was a dependent inmate in my family) under those deeds should be accurately ascertained, protected, and made available.

As Dr. Grinnan was personally acquainted with these lands and with the title to them as well as all claims against them, I desired my said counsel to obtain from Dr. G. full and detailed information on all these *l*ands, as also as to all the transactions by the trustee (Dr. G.) in regard thereto, and to co-operate with Dr. G. in the future management and protection of the trust subject in effecting sales of the lands and in the proper winding up of the trust.

In order to furnish Mr. Marye this information, Dr. G., in the fall or winter of 1867, had a full interview on this business with Mr. Marye. He gave to Mr. Marye full and detailed statements as to the tracts of land, their condition, the state of their title, the claims and charges against them, the prospects of sale, the several amounts of the various debts provided for in said deeds, so far as known to said Grinnan, and of all the transactions theretofore of said Grinnan as trustee, and also explained to Mr. Marye the facts and circumstances attending the execution by Wm. K. Smith of said deeds to said Grinnan.

This statement in detail, *is* made by said Grinnan to Mr. Mayre, was reduced to writing by Mr. Mayre exactly as it was communicated to him in said interview, and at the end of the interview Mr. Mayre read to me this statement and explained the same to
684 me. It set forth the objects of the said absolute deed of October, 1857; the declaration of the trusts as contained in said deed of trust of Feb'y 12, 1859; all the liens and preferred debts on the trust property, with the respective amounts of each, consisting of the several amounts secured to Grinnan individually and as guardian; the amount due G. B. Wallace; also all the taxes due on the lands, the amount due Grinnan for advances, expenses,

and charges as trustee, so as to show how much had to be paid out of the proceeds of the trust property to pay off all the debts and charges standing prior and preferred to the general creditors in whose class stood the claims of myself and Mrs. Smith. In the winter of 1867 and '8 Mr. Marye went with Dr. Grinnan to New York to look after some interests of Wm. K. Smith in Cincinnati and to co-operate in the effort to extinguish or compromise the adverse claim set up by J. F. Cowan to the trust lands, and to endeavor to find purchasers the Kanawha lands. Nothing came out of the visit. From the above period down to the present time Mr. Marye has been in constant intercourse as counsel with Dr. G. in regard to the condition, management, and sale of said trust property and the settling up of the said trust. Various ineffectual efforts were made to effect a sale of the Loup Creek tract. Finally, the contract for sale was made with Long and Norris. Obstacles and delays occurred in getting payments of the purchase-money from them. In the early part of 1872 a considerable payment was collected by Dr. G. from them; enough to pay off nearly all the above referred to preferred debts and the large installment falling due in July, 1872, being expected to be paid up, which, when paid, would discharge all the unpaid residue of said preferred debts so listed and stated by Dr. G. and leave a surplus for ratable distribution among the general creditors. I was hopeful and anxious to get the quotas coming to me and to Mrs. Smith. With this in view, Mr. Marye went to Orange in July, 1872, to confer with Dr. G. He obtained then from Dr. G. an itemized statement of all his pecuniary transactions as trustee down to that period, also a statement of the residue then remain-
685 ing unpaid on the G. B. Wallace debt and the residue due to Mrs. Smith for her agreement for commutation of dower in the trust lands, and Dr. G. furnished then to Mr. Marye a statement showing how much of the proceeds of the sale of Loup creek would remain (after paying off said two preferred debts and satisfying his commissions as trustee) as the net amount applicable for distribution among myself, Mrs. Smith, and the other general creditors. An understanding was had by Mr. Marye with Dr. G. at this time that Dr. G. should, as soon as practicable, get an order made in the pending cause in the circuit court of Fayette Co. directing Com'r Preston to state and settle the trust account of Dr. G. and to convene by publication the creditors of Wm. K. Smith to prove the claims held by them against the trust subject.

Mr. Marye submitted to me the written statement made by him in the above interview with Dr. G. in July, 1872, soon after he obtained it. Delays occurred in getting the said order of court and having the settlement of the trust account and proof of claims of the general creditors before Com'r Preston, but in the latter part of 1873 Mr. Mayre went with Dr. Grinnan to Lewisburg on this business. Dr. Grinnan then laid before Com'r Preston an itemized statement of his transactions as trustee with vouchers, also a statement shewing what was the several amounts of all the preferred debts against the trust subject and the balances due on the two left unpaid as above explained, and Mr. Mayre, as counsel, submitted the statements

and evidences of all the claims held by me in my individual right and as assignee of others, and also the claim of Mrs. Smith, and from this itemized statement of said preferred debts so furnished by Dr. (G.) Grinnan and of the claims of myself and Mrs. Smith furnished by Mr. Marye Com'r Preston made up the account, statements, and report returned by him to court as of February, 1874. Mr. Mayre took copies of all these statements and submitted them to me on his return from Lewisburg.

Delays occurred in the collection of the installments of purchase-moneys due by Long & Norris in 1872, 1873, and
686 1873, notwithstanding frequent and urgent appeals from myself and Mr. Marye and assurances given us by Dr. G. of his strenuous endeavors to effect collections.

In 1873 Dr. G. proposed to me to turn over to me and Mrs. Smith (and the few other general creditors, the amount of whose claims were relatively very small) the bonds for the said unpaid purchase-money and urged me to buy out his half of the Huddleston tract, and he repeated this proposition in 1875, declaring his readiness and anxiety to close up his trust.

In 1874 he effected a collection of a considerable payment from Long & Norris, and in Jan'y, 1876, he paid to the law firm of Marye & Fitzhugh, as counsel for the claims of myself and Mrs. Smith, considerable amounts as quotas on our said claims.

In 1875 he made other large collections from Long & Norris, and in January, 1876, he paid over other large amounts to Marye & Fitzhugh on account of *of* said claims. Dr. G. collected the entire residue of the purchase-money from Long & Norris in 1876 and in January, 1877, and in the latter month made further considerable payments to Mayre & Fitzhugh on account of said claims.

In 1875, 1876, and 1877 Dr. Grinnan made repeated overtures to me, advising me to buy the Huddleston tract. In these overtures he urged as an inducement that as I and Mrs. Smith would receive nearly all the money coming from the remaining instalments of purchase-money from Long and Norris, and would also as creditors own nearly all the one-half interest of the trust estate in the Huddleston tract, if I and Mrs. Smith chose to buy the tract at $12,000.00 we would only have *only* half the said price to pay, and could easily pay this out of our quotas of the trust moneys. Dr. Grinnan wrote me several letters on this subject, copies of which are herewith exhibited. In one of these it will be seen that he furnishes me with a statement of the amount approximately which my claims against the trust subject would be entitled to receive out
of the proceeds of sale of Loup Creek tract, based upon the
687 full and detailed statement laid by him before Com'r Preston, and thus informed me that my quotas as creditor would amount to twenty thousand dollars, and that the entire fund distributed amongst myself, Mrs. Smith, and the other general creditors would be about forty thousand dollars. It will thus be seen that in the year 1867 Dr. Grinnan submitted to Mr. Marye a detailed statement of all the preferred debts chargeable against the trust subject, showing the same to consist, 1st, of the balance due

on the G. B. Wallace debt secured by a lien on 12,000 acres of Loup Creek tract; 2d, of delinquent taxes due on the lands; 3d, the said amounts due to Grinnan individually, viz., 400 to 500, and as guardian of Conway about $700.00; 4th, the amount due to Grinnan as trustee for advances to the trust, and that these were all the preferred debts chargeable on the trust subject, and that when these were satisfied the residue of the proceeds of the trust property would be applicable to pay the general creditors, embracing myself and Mrs. Smith. It will be also seen that again in July, 1872, at said conference in Orange Co. with Mr. Marye, Dr. G. entered into a complete ascertainment and statement of all said matters, and his statement then submitted to Mr. Mayre of the debts and demands against the trust corresponded exactly with this statement in 1867; that again in the winter of 1873–'4 he laid before Com'r Preston, at Lewisburg, a statement of said debts and demands which was identical with those made in 1867 and 1872, and that upon the information so furnished by Dr. G., Com'r Preston made out the account, statement of debts, and report returned by him to court in February, 1874. When Com'r Preston proceeded, in 1879, to execute the order made under the amended bill in Fayette circuit court, filed at the instance of Dr. Grinnan, to restate an account of all the trust transactions and to ascertain and report all the debts and charges against the trust property, with their respective priorities, Dr. Grinnan was again called up to furnish information to Com'r Preston on all these heads. He did communicate to said Com'r P. the information and material necessary to make his report, and upon this Com'r Preston made the ac-
688 count, statement of debts, and report returned as of March, 1880. During all this period, from the year 1867 to 1880, neither in any of said carefully prepared statements and liabilities so made out by Dr. Grinnan nor in any of my personal communications with him, which were frequent and continuous, both oral and written, did Dr. Grinnan even intimate or hint at any claim or demand of his against the trust subject or against Wm. K. Smith except the claims hereinabove specified, nor did I ever hear from any source of any other claim or of Dr. Grinnan alleging that he had any other claim until Mr. Marye informed me of the recent petition filed by Dr. Grinnan in the case in Fayette court. I was utterly astonished *of* his setting up the claim alleged in said petition. I am unable to see on what possible ground such a claim can be allowed. It is not consistent with the provisions of the deeds and contracts which Wm. K. Smith executed to Grinnan, and it is in conflict with the understanding which I always had of the relations between W. K. Smith and Grinnan, derived from my personal intercourse with both of said parties. William K. Smith gave to Dr. Grinnan the one-half interest in the 2,000 acres of Elk Ridge tract called Forest Hall and one-half of the Huddleston tract and the one-half contingent interest in Smith's contract for purchase of the 5,000 acres of Elk Ridge, as per deed from W. K. Smith to him for same, as a full and liberal inducement and compensation for the work to be performed by Dr. Grinnan concerning the care of the

trust property and execution of the trust, and inspection of the trust accounts will shew that Dr. Grinnan has reaped large and liberal pecuniary benefits from his connection with the trust, viz: 1st, at least ten thousand dollars in 1859–1860 from the sale of his half share in Forest Hall tract; 2d, at least seven thousand and five hundred dollars from his commissions as trustee; and Dr. Grinnan holds his half interest in the Huddleston tract, which he values at six thousand dollars, as appears in his said letters to me.

Witness my hand this October 30, 1880.

F. B. CHEWNING.

689 STATE OF VIRGINIA, *Corporation of Fredericksburg,* } *To wit:*

Personally appeared before me, John A. English, a justice of the peace in and for said corporation, Francis B. Chewning, whose name is signed to the foregoing statement in writing, and made oath that the matters therein stated as of his own knowledge are true, and those stated on information derived from others he believes to be true.

Given under my hand this 30th October, 1880.

JNO. H. ENGLISH, *J. P.*

Endorsed: This affidavit of F. B. Chewning and the copies of letters filed therewith and other papers, being *ex parte* and some of them merely copies, are excepted to as evidence for any purpose in these causes. Dennis & Price, for A. G. Grinnan. Nov. 9th, 1880.

Copies of Letters of A. G. Grinnan, Referred to Above, to F. B. Chewning.

Letters.

(Copy.)

JULY, 1872.

Dr. F. B. Chewning.

DEAR SIR: I have been endeavoring to get time to make out a statement, as you desired, but I have not had time, and can only give you an approximation, which, perhaps, will not be satisfactory. I will settle my trustee accounts in August next, and can then give more definite information. I think that after paying Wallace, myself and Cowan, and the expenses of the trust which have necessarily accumulated, there will be for distribution amongst creditors, including Mrs. Smith, near $40,000, but I cannot say with certainty.

The lands sold for $63,000. A payment of $10,000 is due
690 the 20th day of July next, but most of this will go to Wallace and myself. I hope to let you and Mrs. Smith have some money out of this. The other payments fall due in 1873 and 1874, though I am in hopes that parties will cash their bonds in 1873 and pay all * * *

Yours truly, A. G. GRINNAN.

(Copy.)

JAN'Y, 1875.

Dr. F. B. Chewning.

DEAR SIR:—How would Mrs. Smith like to join you in taking the Armstrong Creek property? It would be a good investment and a safe one, and as the share of it belonging to the trust estate will in the end be mostly divided between you both, it seems to me that it would be reasonable that you both join in taking it and enable me thus to close rapidly the trust, which I esteem of great importance to you both, for by doing so you avoid the danger of any other large claims coming up.

Yours truly, A. G. GRINNAN.

(Copy.)

APRIL 8TH, 1875.

Dr. F. B. Chewning.

MY DEAR SIR:—The Armstrong Creek tract of 125 acres is not susceptible of division, and in event that you and myself own it and one party should die, it could not be divided, and much inconvenience might result. If you will buy my interest at $3,500, for which I will merely take your receipt to me as trustee, paying myself out of trustee funds hereafter accruing to you, I will, with the assent of Marye, as attorney for Mrs. Smith and yourself, offer the half belonging to the trust fund at public auction, and you can buy it in for yourself and then control the whole of it. Most
691 of the trust fund will accrue in any event to Mrs. Smith and yourself. I could then close very quickly my trust account and avoid any further complications, to the great advantage of Mrs. Smith and yourself. There are two or three small tracts I would also sell if you desire it very cheap—a few dollars per acre—and wind up the whole affair. * * *

Yours truly, A. G. GRINNAN.

(Copy.)

AUGUST 4, 1875.

Dr. F. B. Chewning.

DEAR DOCTOR:—My estimate was that you would get about twenty thousand dollars in all. I shall, doubtless, be able to make a considerable payment as trustee in January next. I learn that the parties will arrange to pay the next bonds then. I wish you would take the unsold lands, and I can close my whole account next fall, after you have made all arrangements you contemplate.

Yours truly, A. G. GRINNAN.

(Copy.)

MARCH 26, 1877.

Dr. F. B. Chewning, Fredericksburg, Va.

DEAR SIR:—Your favor received and attended to. Some parties are negotiating with me for the Armstrong Creek property, 125 acres, at $12,000. I do not yet know their determination. ½ of this

belongs to the trust fund. It is a great mistake in you and Mrs. Smith not to join and take this entire property. You would, by present calculations, have to pay but little over my ½ of it, and it can now be leased for coal-mining so as (to) pay at least $1,000 semi-annually,—$2,000 a year and perhaps more. It would be the interest of the lessee to mine more. * * *

Yours truly, A. G. GRINNAN.

692 Endorsed: See exceptions endorsed on Chewning's affidavit.

At *at* another day, to wit, at a circuit court continued and held for the county of Greenbrier, on Monday, the 1st day of November, 1880.

Decree.

A. G. GRINNAN
vs.
S. C. LONG & *al.*

and

CHEWNING
vs.
COWAN & *al.*

Upon the motion of the plaintiff in the first of these causes, these two causes are continued until the next term; and upon motion of the said plaintiff, the report and amended report of Com'r John A. Preston, Esq., are recommitted to him, with directions to hear further proof in the causes as regards the debts heretofore presented or such as may be hereafter presented and to indicate on his said report the priorities of all the debts which have been heretofore produced or which shall be hereafter produced and upon what fund such priorities attach. He shall also hear such proof as the parties may produce in regard to what is called the "right of way" on the Elk Ridge tract of land, whether the same is a superficial or horizontal right of way, and how such right of way may effect the owners of the lands over or through which the road may or will pass and to what amount they will or may be damaged thereby. He shall also ascertain and report the damage, if any, which the said plaintiff, Grinnan, may or has sustained by reason of his warranty in the deed of the said plaintiff to John Halstead and the amount which the said plaintiff may be entitled to recover against the estate of the said William K. Smith, dec'd, on account of the breach of said warranty if such breach shall occur; and Alexander H. H. Stewart and John W. Johnston, personal representa-
693 tives of Wm. W. Boyd, dec'd, tendered to the court a copy of the bond of said Wm. K. Smith, dec'd, dated on the 24th day of March, 1860, for $2,500, payable to said Stuart and Boyd, attorneys, for Dennis Wheeler's heirs; and thereupon the court ordered

the same to be filed and referred to the com'r aforesaid to be reported upon by him together with the other debts of said Smith hereinbefore directed to be reported upon, and shall report any other special matter which may be required by any party or which he may deem material himself. Mrs. A. H. Smith having departed this life, the fact of her death is ordered — be suggested upon the record.

And now, at this day, to wit, at a circuit court continued and held for the county of Greenbrier, on Wednesday, the 10th day of November, 1880.

Decree.

CHEWNING'S ADM'R
vs.
COWAN & *al.*

and

GRINNAN
vs.
CHEWNING, &c.

These causes came on this day to be further heard on the papers formerly read and upon the report returned to this term of the court by Com'r Preston upon the matters of his former report recommitted to him at the last term of the circuit court of Fayette county, with the exceptions of said A. G. Grinnan to said report, and upon the petitions of A. G. Grinnan, and the petition of Tifft as assignee of Dodge, Bacon & Co., and the affidavits of A. G. Grinnan and John L. Marye and F. B. Chewning, and the exhibts filed therewith, with the exceptions of A. G. Grinnan endorsed thereon, and upon the answer returned by A. G. Grinnan to the rule awarded against him at the last term, and the decree entered herein on a former day of this term, and was argued by counsel. Upon consideration whereof it is adjudged, ordered, and decreed
694 that the decree entered in these causes on a former day of this term be, and the same is hereby, set aside; and it appearing to the court by the petitions of A. G. Grinnan that there is a contingent liability likely to be set up against the trust fund in this cause by reason of the alleged deficiency in the acreage of the Forest Hill tract and by reason of the alleged loss of the right of way to the owners of said tract over the Elk Ridge tract, as set forth in said petition, and it further appearing to the court that said assignee of Bacon, Dodge & Co. and that A. H. H. Stuart and —— Johnson as administrators of —— Boyd allege that they have claims against the trust fund, and it further appearing that A. G. Grinnan has also set up by one of his said petitions a claim against said fund, this court doth recommit said report of Com'r Preston to said commissioner with instructions to enquire and report touching all said matters, viz., whether said alleged liabilities as to deficiency of acre-

age and loss of right of way are likely to result in the establishment of any claims against said funds and the probable amount thereof, if any, together with the evidence upon which the conclusions of the com'r *is* based, and, further, as to whether said assignee of Bacon, Dodge & Co. and said administrators of —— Boyd and said A. G. Grinnan have any claims against said trust fund and the amounts thereof respectively and the evidence upon which said claims are based, and that said com'r shall make any further inquiries that he or any party in interest in this cause may deem necessary, and said A. G. Grinnan may be cross-examined by any of the other parties to these suits as to any matter referred to said commissioner upon which said Grinnan has heretofore been examined or made any statement in these causes; and it appearing to the court by the said report of Com'r Preston that there are in the hands of Andrew G. Grinnan, trustee, twenty-one thousand and thirteen $\frac{24}{100}$ dollars ($21,013.24) belonging to said trust fund, the court doth adjudge, order, and decree that said exceptions to the affidavits aforesaid be overruled and that said A. G. Grinnan shall, within sixty
695 days from the date of this decree, pay over to Alexander F. Mathews, receiver of this court, the said money and all other money belonging to said trust and shall deliver to said receiver all choses in action and evidences of debt and personal property belonging to said trust held by him or under his control. The said Commissioner Preston, before executing the order of enquiries above directed, shall publish in one of the Lewisburg papers a notice for four weeks of the time and place of his proceeding to execute the same in lieu of personal service. A copy of this decree shall be served upon said Andrew G. Grinnan and upon Samuel Price or R. F. Dennis, his attorneys, by the clerk of this court as soon as the same is entered and said clerk shall make return of said service, and upon the defendant A. G. Grinnan giving a proper suspending bond, as prescribed in the statute, in the penalty of $22,000, the execution of this decree shall be suspended for 90 days from this date to allow the said defendant opportunity to present his petition for an appeal.

I, Jonathan Mays, clerk of the circuit court of Greenbrier county, State of West Virginia, do hereby certify that the foregoing is a true transcript as taken from the records and papers of my office in the chancery causes of F. B. Chewning and others *vs.* J. F. Cowan and others and A. G. Grinnan *vs.* S. C. Long and others.

J. MAYS, *Cl'k.*

(Fee for this record, $45.00.)

(Endorsed:) A. G. Grinnan *vs.* S. C. Long & *al.* B. F. Chewning *vs.* Sydney C. Long & *al.*

696 *Record.*

F. B. CHEWNING
vs.
COWAN & *als.*

Filed in case of Grinnan *vs.* Chewning & *al.* as exhibits.

WEST VIRGINIA:

Pleas before the judge of the circuit court of Greenbrier county on the 10th day of November, 1880.

Be it remembered that heretofore, to wit, at rules held in the clerk's office of said court on the first Monday in ——, 1871, came F. B. Chewning and filed his bill of complaint against J. F. Cowan *et al.*, which, with the exhibits therein referred to, *are* in the words and figures following, to wit:

Bill of Complaint.

To the Honorable Henry L. Gillespie, judge of circuit court of Fayette county, State of West Virginia:

Hereby complaining, showeth unto your honor your orator, F. B. Chewning, that Wm. King Smith, who at the time owned the property hereinafter more fully described, by deed of the 29th of October, A. D. 1857, on its face conveyed in fee simple to A. G. Grinnan the following real estate lying in the county of Fayette, State of Virginia, but now West Virginia, viz., forty thousand acres, more or less, which was conveyed by Wm. H. Edwards, December 2d, 1852, to Wm. K. Smith; also the interest of the said Smith in a tract of 7,000 acres, more or less, on the west side of Armstrong creek, conveyed to said Smith by said Edwards on the first of August, 1853; also the remaining half of a tract of about 200 acres lying on the Kanawha below Armstrong creek, being the
697 tract contracted to be conveyed to said Edwards for the benefit of said Smith by George Huddleston; also a tract of about fifteen acres patented to L. H. Brannon on the 11th of Nov., 1854, and conveyed to said Smith by said Edwards on the 7th of October, 1857; that although this deed *that* on its face a deed of absolute, direct conveyance of the entire subject in fee simple to the said A. Grinnan, there was in part or to the greater part of the said property coupled therewith a secret trust. It was at the time of said conveyance believed that the said A. G. Grinnan would be able to effect a sale of the said property in a very short time and that a direct, absolute conveyance of the whole subject to him in fee simple would facilitate such sale and simplify the transfer and conveyance of it to parties who might buy, and hence it was thus conveyed to the said Grinnan; that after a lapse of some time without the said Grinnan having effected the sale of the said property, it was sug-

gested by the said Grinnan and concurred in by the said Smith that it would be best to express in writing the said secret trust and to limit and define precisely the powers and duties of the said A. G. Grinnan in reference thereto. Accordingly on the 10th day of Feb'y, A. D. 1859, they entered into a written agreement by which the nature, extent, and objects of the said secret trust *there* set forth and the said power and duties of the said A. G. Grinnan thus limited and defined. In the recitals of the said agreement it was set forth that by the deed aforesaid of Oct. 29th, 1857, a copy of which is herewith filed as Exhibit No. 1, to be taken and read as a part of this bill, the said Smith did convey to the said Grinnan all the property of said Smith in the county of Fayette aforesaid, to wit, one-half of Forest Hill tract, containing 2,000 acres, more or less, for the title to which he held a bond from Wm. H. Edwards, the other half having been previously sold and conveyed to said Grinnan in fee simple; also his interest in a tract adjoining and known as Elk Ridge (said tract of Forest Hill and Elk Ridge constitute what was recently known as the Forest Hill tract), containing 7,000 acres, for the title to which he likewise held a bond from Edwards, and half of said Elk Ridge tract
698 having been sold and conveyed with restrictions to said Grinnan; also one-half of a tract bought from George Huddleston adjoining the forenamed tract, lying on the Kanawha, containing 200 —, the other half — been sold to said Grinnan in fee simple; also a tract of 15 acres named in said deed of Oct. 29th, 1857, one-half of which said Grinnan holds in fee simple, the other half for the purpose hereinafter named, together with the remaining part of Wilson's survey lying east of the property of the Mount Carbon Co., supposed to contain 30,000 acres, more or less, which is the same tract before described as 40,000, of which tract 12,000 acres have been convey- to secure a debt to G. B. Wallace. After these recitals the said contract and agreement proceeds to state that "therefore" it is understood and agreed that the said Grinnan shall hold one-half of the fifteen acres aforesaid, with the rights thereto annexed in fee simple, and that the remaining property conveyed in said deed, to wit, one-half of the Huddleston tract (the other half of the said tract having been conveyed to said Grinnan in fee simple by deed dated Oct. 15, 1857) and half of the 15-acre tract and the remainder of the Wilson survey, shall be held by the said Grinnan for the purposes hereinafter named and in manner as follows, to wit: That the said Grinnan shall have the right to create liens on the said property to raise money to pay expenses of selling the same, as it may be to the interest of parties to negotiate a private sale, and shall have right at any time to sell said property and any part thereof at private sale, and after six months from the date of said agreement at public sale, at such time and upon such terms as may be deemed best, paying from the net proceeds of sale the debts due or which may become due said Grinnan from said Smith or from which said Grinnan may be or become bound as security or on account of said Smith, either before or after the date of said agreement, including among other items several debts due said Grinnan, one of

which is due him as guardian of the children of Wm. H. Conway, together with the expenses incurred in selling or endeavoring
699 to sell said property and a proper remuneration to said Grinnan as trustee, but not to be less than 3 per cent.

2d. To pay after said claims, which are of the first class, the debts acknowledged in writing by the said Smith to be just (excepting the claims of Dodge, Bacon & Co. be otherwise provided for), including $25,000.00 due to Mrs. Abigail H. Smith, the wife of said Smith, to be held in trust by said Grinnan for her separate use and benefit, subject to disposal by her by *bill*, or only the interest thereon to be paid to her annually; also the sum of ten thousand dollars due to your orator, F. B. Chewning, the exact sum supposed to exceed this amount; that the amount due your orator and which is provided for by the said agreement to be paid out of the said trust fund is more than $10,000, as your orator will hereafter show. There are some other stipulations in same agreement and contract which need not be particularly set forth here. A copy of the said agreement is herewith filed as Exhibit No. 2, to be read and taken as a part of this bill. The said contract and agreement was, on the 10th day of March, A. D. 1859, duly admitted to record in the clerk's office in the said county of Fayette, then a part of the State of Virginia, but now in the State of West Virginia. That it thus appears that the said Grinnan, under the deed of the 28th of Oct., 1857, held in secret trust one-half of the Forest Hill tract of 2,000 acres, one-half of the Elk Ridge tract of 5,000 —, one-half the Huddleston tract of 200 acres, one-half of the 15-acre tract, and the whole of the Wilson survey of 35,000 acres; that this trust was set forth and defined by the contract and agreement of the 10th of Feb'ry, 1859, which were duly recorded on the 10th day of March, 1859, in the clerk's office of the county court of Fayette county, wherein the said land and — were thereby made to operate as notice to all the world of the existence of the said contract and agreement and of every stipulation and provision therein contained; that while it confers on the said A. G. Grinnan ample power to sell the said land for the purposes and according — the provisions of said trust, it gave him no power whatever to confer the said
700 trust and trustee duties thus conferred upon him *were* matters of personal trust and confidence which he had no power to confer upon any one else; that at the time of said agreement of the 16th of Feb'ry and from that time down to the death of the said Wm. K. Smith the said Smith, as the said deed strongly tends to show, was deeply and heavily embarrassed by his debts, and, as your orator believes and therefore charges, was insolvent; that some time after the said 10th of Feb'ry, 1857, the said Grinnan, as your orator believes and therefore charges, through inadvertence and misapprehension of his power and duties, executed a power of attorney to the said Wm. K. Smith, which, as your orator is informed, though he does not know the fact, yet believing it to be true he charges it, he undertook to give to the said Smith power to contract for the sale of said land; that your orator does not — whether or no the said Smith ever entered into any agreement by which he

undertook to sell the said lands or any part thereof, but your orator has known that one J. F. Cowan, of New Jersey, claims to have purchased from the said Wm. K. Smith, under authority from the said Grinnan, the said lands or a part of them in April, 1866, which contract he claims to have been reduced to writing and duly recorded in the clerk's office of the county court of Fayette county. Whether this is so or not your orator does not know, and at Fredericksburg, Va., where this bill is prepared, he has no means at this time of ascertaining, but if the said J. F. Cowan does claim anything under such contract your orator insists that he shall state precisely what he does claim, what is the consideration, and all the grounds upon which he bases his said claim. He shall set forth and file with his answer to this bill a copy of such agreement, and if he cannot do so that — shall state the reasons why he cannot and state the precise terms of the said alleged agreement, and that he shall also produce and file with his said answer the evidence of the authority under which he claims to have made his said alleged contract with the said Smith, and that he shall be required to
701 prove the genuineness of any writing upon which to any extent — basis his said claim. Your orator has heard and believes and therefore charges that the power under which the said Cowan alleges he has contracted with the said Smith will not confer any authority upon the said Smith to make any such contract as the said Cowan alleges he has made with the said Smith.

Your orator further charges that if the said Cowan has any contract or agreement with the said Smith in reference to the said lands that it was procured, and that he now comes forward to assert it, with a view to defraud the rights of your orator and the other beneficiaries of the said trust. He further charges that any instrument of writing which the said A. G. Grinnan may have executed and by which he attempted to give any power to the said Wm. K. Smith to dispose of or in any way control the said trust property was null and void, because the trust in the said Grinnan was and is a personal trust which he has no power to delegate to another.

Your orator further shows that the said A. G. Grinnan has recently sold to S. C. Long and G. W. Norris the said tract which is described as 35,000 acres, the 5,000 acres, except some small parcels thereof which he had previously sold to others, but which your orator cannot precisely describe; that a sale of the said property was necessary to redeem it from tax sale, the time for redeeming which had nearly expired, and to prevent the sale of the 12,000 acres under Wallace's trust deed; that after this sale had been made the said Cowan came forward, as your orator has been informed and believes, and asserted some claim to the said property, and thus casts a cloud upon the title thereof; that the said Cowan availed himself of the necessities of the trust estate, made urgent by the facts just stated, to obstruct and prevent this sale by Grinnan to Long & Norris, with a view to receiving something out of the trust estate by way of compromise, to which he was neither in law nor morals entitled; that your orator has been informed and believes, and therefore charges, that the said Cowan has made

a contract with the said S. C. Long or with the said Long & Norris by which he has sold the rights which he pre-
702 tends to claim under said alleged contract with Smith to the said Long & Norris or one of them, and that it is the purpose of the said Long & Norris or the one of them who is a party to offset the purchase-money which he may be compelled to pay to the said Cowan under his said contract against the purchase-money which the said Norris & Long or one of them have agreed to pay to the said A. G. Grinnan, trustee, for the same lands; that the said sale to the said parties was fraudulently made on the part of the said Cowan; that the said party was induced to enter into it upon false and fraudulent representations made by the said Cowan to the said party; that among other things he falsely and fraudulently represented to the said party that the said A. G. Grinnan had power and authority to confer upon the said Wm. K. Smith the power to sell the said *the said* property and to receive the purchase-money thereof; that he had given said Smith such power that the said Wm. K. Smith, by virtue of the said power and authority, had sold the said property to him and had received large sums of money from him which he had paid to him on account of his having purchased the said property from the said Smith; that these false and fraudulent representations were made with a view to and for the purpose of throwing a cloud upon the title to the same property which the said Grinnan, as trustee, had sold to the said Long & Norris, did cause the said Long & Norris to refuse to execute their said agreement with the said A. G. Grinnan and to refuse to pay him the purchase-money they had contracted to pay him therefor, and thereby to put it out of the power of the said Grinnan in his own right and as trustee aforesaid to ratify the same trust deed to secure the debt to G. B. Wallace and the other claims for which the said property was liable to be forced into market and thereby sacrificed and thus lose the whole of the said lands or else compromise with the said Long & Norris that they may thereby pay him a large bonus to surrender his fraudulent demands, which he knows has no validity whatever in them. Your orator charges that any sale of said property
703 or of any right or claim thereto by the said Cowan to said Norris & Long or either of them was effected upon false and fraudulent representations; that it was without any good or valuable consideration to support it; that — was falsely and fraudulently done by said Cowan to inflict irreparable injury upon the trust estate or else to fraudulently wring blackmail out of it; that it is therefore void, of none effect, and should be set aside unless the said Long and Norris or whichever of them may have contracted as aforesaid with him shall agree of their or his own free will — pay him the purchase-money they have contracted to pay him; that if they do thus agree to pay him without objection and resistance after having come to a knowledge of the facts, then they will have no ground on which to refuse or delay to pay to the said Grinnan the purchase-money due by them to him according to their contract with the said Grinnan, a copy of which will hereafter — filed as

Exhibit No. 3, to be read as part of this bill if your orator can procure it.

Now, forasmuch as your orator is without adequate relief in the premises, to the end that the said A. G. Grinnan, in his own right and as trustee aforesaid, the said J. F. Cowan, the said S. C. Long and J. W. Norris, the said Abigail Smith, and —— ——, adm'r of the said Wm. K. Smith, and the creditors of the said Wm. K. Smith whose debts he has acknowledged in writing to *her* just, but whose names are unknown, and Thomas L. Broun, who claims an interest in the land, may be made parties defendant to this bill and be made to answer under oath fully, completely, and in detail each obligation thereof; that if the said Cowan should pretend to assert any claim or right to said property or any part thereof under any alleged contract with said Smith or any one else the same may be set aside and declared to be null and void; that any contract he may have made with the said Norris & Long or either of them may also be set aside as null and void unless they agree willingly to pay the purchase-money thereunto to the said Cowan without any compromise of the law; that the said Norris & Long may be required
704 to comply with and execute their said contract with A. G. Grinnan; that the said Grinnan may be restrained and enjoined from allowing to the said Norris & Long any abatement of the purchase-money they have contracted to pay him for said land on account of any claim on the part of the said Cowan or on account of any payment they may choose to make to him on account of his said false and fraudulent claim or on account of any contract they may have made with him for the purchase of his pretended claim to said Cowan or any of them; that said Grinnan may show what lands he has sold to said Norris & Long and for what price; that the said Norris & Long may be required to file with their answer a copy of their contract with Grinnan; that said Grinnan may be required to apply the purchase-money received from said Norris & Long to purposes of the trust and especially to pay the debt secured to your orator according to the amount actually due, and that your orator may have such relief in the premises as he is entitled to.

F. B. CHEWNING.

November 8th, 1870.

I certify that the above is a true copy of F. B. Chewning's bill filed in this office Jan'y 11th, 1871, in the suit of F. B. Chewning *vs.* J. F. Cowan *et al.*, in ch'y.

COPY OF DEED REFERRED TO IN BILL AS EXHIBIT NO. 1.

EXHIBIT NO. 1.

This indenture, made this twenty-ninth day of October, in the year eighteen hundred and fifty-seven, between Wm. King Smith, of Fredericksburg, Virginia, of the one part, and A. G. Grinnan, of the other part, witnesseth:

That for the sum of one dollar, and further valuable consideration, the party of the first part does grant and convey, with general warranty, unto the party of the second part the following property, to wit, the real estate of said Smith in the county of Fayette, Virginia, including a tract of forty thousand acres, more or
705 less, conveyed to said Smith by Wm. H. Edwards on December 2d, 1852; also the interest of said Smith in a tract of seven thousand acres, more or less, on the west side of Armstrong's creek, conveyed to said Smith by said Edwards on the first of August, 1853; also the remaining half of a tract of about two hundred acres lying on the Kanawha below Armstrong's creek, being the tract contracted to be conveyed -- said Edwards for said Smith's benefit by George Huddleston; also a tract of about fifteen acres patented to L. H. Brannon on the 11th of Nov., 1834, and conveyed to said Smith by said Edwards on the 7th of October, 1857.

Witness the following signatures and seals:

WM. K. SMITH. [SEAL.]
——— ———. [SEAL.]

STATE OF VIRGINIA,
City of Richmond, } *To wit:*

I, James Pleasants, a notary public for the said city, in the State of Virginia, do certify that W. K. Smith, whose name is signed to the writing above, bearing date on the 29th day of October, 1857, has acknowledged the same before me in my said corporation.

Given under my hand this 29th Oct., 1857.

JAMES PLEASANTS, *Not. Pub.*

FAYETTE COUNTY COURT CLERK'S OFFICE,
November 14th, 1857.

The foregoing deed, with the certificate of acknowledgment thereto annexed, was presented in said office and is admitted to record.

Teste: J. B. JONES, *Cl'k.*

STATE OF WEST VIRGINIA:

COUNTY OF FAYETTE, RECORDER'S OFFICE,
April 12th, 1866.

The foregoing deed, with the certificate thereto annexed, is a true copy from the records of this office.

Teste: G. M. BLUME, *Recorder.*

706 EXHIBIT NO. 2 REFERRED TO IN BILL.

EXHIBIT NO. 2.

These articles of agreement, entered into this tenth day of February, in the year eighteen hundred and fifty-nine, between Wm. King Smith and A. G. Grinnan, both of Fredericksburg, Virginia, witness:

That whereas, said Smith did, on the 29th day of October (twenty-ninth day of October), eighteen hundred and fifty-seven, convey to said Grinnan all the property of said Smith in the county of Fayette, State of Virginia, then held by him, to wit, one-half of Forest Hill tract, containing two thousand acres, more or less, for the title to which he held a bond from Wm. H. Edwards, the other half having been previously sold and conveyed to said Grinnan in fee simple; also his interest in a tract of land adjoining and known as Elk Ridge (said tract of Forest Hill and Elk Ridge constitute what was recently known as the Forest Hill tract), containing five thousand acres, for the title to which he likewise held a bond from Edwards, one-half of said Elk Ridge tract having been previously sold and conveyed with a certain reservation to said Grinnan; also one-half of a tract bought from George Huddleston, adjoining the aforenamed tracts, lying on the Kanawha, and containing about two hundred acres, the other half having been sold and conveyed to said Grinnan in fee simple; also a *a* tract of fifteen acres named in said deed of Oct. 29th, 1857, (one-half of which said Grinnan holds in fee simple, holding the other half for the purposes hereinafter named), together with the remaining part of Wilson's survey lying east of the property of the Mount Carbon Company, and supposed to contain tirty-five thousand (35,000) acres, more or less, of which tract 12,000 acres have been conveyed to secure a debt due to G. B. Wallace. Now, therefore, it is understood and agreed that said Grinnan holds one-half of the fifteen acres aforesaid, with the rights thereto annexed, as recited in said deed of Oct. 29th, 1857, in fee simple, and that the remaining property conveyed in said
707 deed, to wit, one-half of Forest Hill tract, the interest in Elk Ridge tract, the one-half of the Huddleston tract (the other parts of said tracts having been conveyed to said Grinnan in fee simple by deed of date the first of Oct., 1857), one-half of the fifteen-acre tract and the remainder of the Wilson's survey shall be held by said Grinnan for the purposes hereinafter named and in manner as follows, to wit: That said Grinnan shall have the right to create liens on said property to raise money to pay expenses of selling the same, as it may be to the interest of parties to negotiate a private sale, and shall have the right at any time to sell said property, or any part thereof, at private sale, and after six months from the date hereof, at public sale, at such place and time and upon such terms as may be deemed best, paying from the net proceeds of sale first the debts due or which may become due said Grinnan from said Smith, or for which said Grinnan may be or may become liable as security or on account of said Smith, either before or after the date of this paper, including among other items the sum of four hundred and thirty-eight dollars, with interest from February 1st, 1859, due said Grinnan on open account, and the sum of seven hundred and fifty-eight dollars, with interest from Oct., 1857, due said Grinnan as guardian of Wm. H. Conway's children, together with the expenses incurred in selling or endeavoring to sell said property, and such remuneration as may be deemed proper, but not less than five per cent. on sales; paying, secondly, after said claims of the first class

are satisfied, the debts acknowledged in writing by said Smith to be just, excepting the claims of Dodge, Bacon & Co., a lien to secure which having been previously given that firm on five thousand acres of the Wilson survey, for which reason they are excluded from any benefit under this agreement, including the sum of twenty-five thousand dollars ($25,000) due Mrs. Abigail Smith, the wife of said Smith, for relinquishment of property to satisfy previous creditors of said Smith, to be held in trust by said Grinnan for her separate use and benefit, subject to disposal by her will or order, the interest to be paid her annually. Also the sum of ten thou-
708 sand dollars due to Dr. F. B. Chewning, of Fredericksburg, Va.—the exact sum supposed to exceed this amount; but should any creditor, by suit or otherwise, endeavor to force a sale of said property, or to secure his debt to the prejudice of other creditors of said Smith contrary to the provisions of this instrument, he shall not be entitled to any benefits which might therefrom otherwise accrue to him, it being the object of said Smith to prevent a sacrifice of property, and thereby more effectually to satisfy his debts.

It is further agreed that said Grinnan may trade or exchange said property, or any part thereof, for other property or real estate, holding the property received in exchange subject to the provisions of this instrument.

Witness the following signatures and seals:

W. K. SMITH. [SEAL.]
A. G. GRINNAN. [SEAL.]

The words "or order" in the 7th line *was* interlined before signing.

STATE OF VIRGINIA, *Corporation of Fredericksburg,* } *To wit:*

Personally appeared before me, a justice of the peace in and for my corporation aforesaid, on this 10th day of February, in the year 1859, William Smith and A. G. Grinnan, to me well known, and acknowledged the foregoing writing to be their act and deed.

Given under my hand.

PETER GOOLRICH, *J. P.*

FAYETTE COUNTY COURT CLERK'S OFFICE,
March 10th, 1859.

The foregoing article of agreement was received for record, and, with the certificate of acknowledgment thereto annexed, is thereto admitted.

Test: J. B. JONES, *Cl'k.*

709 WEST VIRGINIA:

FAYETTE COUNTY RECORDER'S OFFICE, *June* 11, 1870.

The foregoing is a true copy from the records in my office.

Teste: G. M. BLUME, *Recorder.*

(Exhibit No. 3 of bill not found.)

Answer of A. G. Grinnan.

The answer of Andrew G. Grinnan, of the county of Madison, State of Virginia, to a bill filed in the circuit court of Fayette county, in the State of West Virginia, by F. B. Chewning against the said respondent, in his own right and as trustee of Abigail H. Smith, J. F. Cowan, and others.

This respondent, reserving to himself the benefit of every proper exception to the said bill of complaint, for answer thereto says that it is true that Wm. K. Smith, by deed of the 29th of October, A. D. 1857, conveyed, as stated in the bill, the lands therein named in manner and form as therein stated and upon the trusts named therein; that at his instance the agreement of the 10th of February, 1859, was entered into, by which the nature, extent, and objects of the secret trusts of the deed of the 29th day of October, A. D. 1857, were set forth and the power and duties of respondent were limited and defined; that the said agreement was such as is described in the said bill; that the said agreement was admitted to record in the clerk's office of the county court of Fayette county on the 10th of March, A. D. 1859, in the State of West Virginia; that the said Wm. K. Smith, on the 10th of February, 1859, was insolvent and continued so until his death; that respondent, on the 30th of October, A. D. 1865, did execute a power of attorney, bearing date on that day, by which he undertook to authorize the said Wm. K. Smith "to contract to sell the part of Wilson survey in Fayette county, Virginia (now West Virginia)," lying near Loup creek and the waters of the Kanawha river, conveyed "to respondent" by said Smith in 1857, containing
710 35,000 acres, more or less; also "respondent's" interest as said trustee and in "his" own right in the Elk Ridge tract, on Armstrong creek, in said county, upon terms stated in "his" letter of instructions to said Wm. K. Smith of even date with said power of attorney, a copy of which power of attorney is herewith filed as Exhibit No. 1, to be read as a part of this answer; that the said letter of instructions — referred to in the said power of attorney and instructed the said Smith to sell the said 35,000 acres for $40,000.00, clear of commission, and the Elk Ridge tract and its frontage on the Kanawha river for $20,000.00, exclusive of commission, and to contract that upon respondent's receiving the consideration for the lands he should convey such title as was vested in him. A copy of the said letter is herewith filed, to be read as a part of this answer, as Exhibit No. 2; that respondent receives in due course of mail a letter from Wm. K. Smith, New York, dated April 21st, 1866, requesting him by return mail to send him an order to receive $3,000.00 on the contract of sale of the 35,000 acres of land on the Great Kanawha; a copy of which letter is herewith filed as Exhibit No. 3, to be read as a part of this answer. This and a short note of the 20th was the first information respondent, as far as he remembers, had received of said sale, and all the information he

had on the subject except that he had been trying to negotiate a sale of the 35,000 a. When declining to sign such a paper as the said Smith in said letter requested him to sign he executed a paper which he forwarded to said Smith (who has a power of attorney from his wife authorizing him to collect money for — from this respondent) by which respondent authorizes said Smith to collect on account of his wife's interest two thousand dollars from the parties with whom he made a contract for the sale of Loup Creek land in Fayette county under the authority given by respondent to said Smith—this paper bore date the 24th of April, 1866—and at the same time he executed a similar paper authorizing him to receive for respondent, as trustee, $1,000.00; a copy of which letter is herewith
711 filed as Exhibit No. 4, to be read as a part of this answer. Respondent cannot furnish an exact copy of the first-named receipt, but they were each alike *mutatus mutandis*. The order expressly authorises him to receive money under a contract of sale made under authority given by respondent to said Smith, and was so worded because respondent knew nothing of the terms of the contract nor of the parties contracting to buy further than stated in Smith's letter of the 21st of April, 1866. These orders were forwarded at once by mail to the said Smith. After that respondent received in due course of mail a letter from the said Smith, dated at New York, May 1st, 1866, in which he states that the letter of respondent of 24th April, 1866, had been received, but not in time to prevent some of the parties from backing square out; a copy of which is herewith filed as Exhibit No. 5, to be read as a part of this answer. About the 24th of May, 1866, respondent wrote to Smith, urging him to sell the said lands, and on the 26th of May, two days thereafter, Smith wrote in reply, stating that the sale had not been made and expressing the deepest anguish at the unpleasant situation of himself, his wife and children, in consequence thereof; a copy of which is herewith filed as Exhibit No. 6, to be read as a part of this answer. In reply to a letter of respondent inquiring about the prospects of selling the said lands, the said Wm. K. Smith, on the 9th of July, 1866, wrote from New York, stating that no sale could be made for two months, and in said letter he makes statements showing that he was without means. A copy of it is herewith filed as Exhibit No. 7, to be read as a part of this answer. At and about this time the destitution of Smith was such that his trunks were detained at the Astor house on account of his unpaid board, and he died in the fall of 1866 in such a state of destitution that he had not been able to redeem his said trunks, which contained his clothing and papers. Respondent was in the city of New York in December, 1886, and in January, 1867, and, having been told by Smith in his lifetime that J. F. Cowan, Esq., had been aiding him in effecting a sale of the said lands, respondent sought out Cowan and asked him what could be
712 done with the said lands. Cowan then told respondent that he had a contract with Smith for the purchase of the said Loup Creek lands which would expire Nov. 1st, 1867—that is, that he had until the 1st of Nov., 1867, to complete it, and if it was not

completed by that time his rights under it ceased; that he had paid $1,500.00 (fifteen hundred dollars) on the contract. When respondent expressed his surprise and doubt as to this statement, because Smith had never let respondent know he had received any money, he produced the original of the above-named authorization from respondent of the 24th of April, 1866, and upon each were endorsed credits or receipts for money paid. Respondent then told him he did not know that Smith had made any contract with him and demanded that he should exhibit it to him, so that if it was such a contract as he approved he might see to its fulfilment. Cowan promised to get it, but failed to do so. Respondent remained in New York for some weeks thereafter, and during that time repeatedly demanded of Cowan to see the said contract, but he as often promised to exhibit it to him without ever complying with said promises. In the latter part of the year 1867 he proposed to sell the said lands, as agent of this respondent, and a correspondence was carried on between him and respondent in reference thereto from some time in December, 1867, down to April, 1870, in which he repeatedly speaks of his efforts to sell them as agent, urges respondent to lower his price that he may succeed selling, and in no way makes the least pretense that he has the right to the said lands, and in the said correspondence respondent apprised him of the fact that he had sold 12 or 1,300 acres of land, for he then thought he had made such sales, though they were not all carried out, and the said Cowan still made no claim to the said lands or any part thereof. Copies of such of respondent's letters as he has and of such of the said Cowan's letters as he can furnish that are material to this matter are herewith filed as Exhibit No. 8–10, inclusive, to be read as parts of this answer. In the latter part of 1869

713 respondent met him in Washington city and told him that if he did not effect a sale soon for respondent that he, respondent, would sell it himself. He then told respondent if he did so that he, Cowan, would sue him on the old contract. Respondent told him if he had a contract why did he not produce it and if it was valid execute it. Respondent also demanded to see the contract, but he never produced it. Subsequently he wrote to respondent that he could sell the said Loup Creek lands for $65,000.00 or would give $65,000.00 for it, and afterwards requested respondent come on to Philadelphia and close a sale at that price. Respondent in reply wrote him that he would take $65,000 for the land free of commission. This proposition the said Cowan accepted and respondent went to Philadelphia to close the sale, but the said Cowan and his associate failed to comply within a week. Respondent then insisted that he should pay respondent $150 on account of the trouble he had been to and his loss of time in this futile attempt to sell occasioned by Cowan, and if he closed the sale, as he said he would do, this $150.00 to be credited on the new contract, as referred to in his letter of Feb'ry 19th (Exhibit No. 14). Cowan, however, did not comply, though he paid the $150.00 by his acceptance. Subsequently, in May, 1871, respondent sold an undivided six-sevenths of the said Loup Creek land and an interest in some other

lands to Messrs. Norris & Long, with a stipulation in said contract to the effect that if at the expiration of 60 days from the date thereof they failed to elect to complete the said sale they were to be released therefrom, which contract they did elect in due time to complete. This sale was made by respondent because of the urgent necessities of the trust estate, as stated in the bill. Some time after this, in 1871, the said Cowan, having heard of this sale to Norris & Long, notified them that he claimed the property under a previous contract; that unless they would purchase his rights to the land (which he offered to sell to them) by the 2d of November he would sell them to a capitalist who had offered to give $80,000.00 for the said land. This brought about an interview between the said Long and Cowan and Thomas L. Broun, as the agent and attorney of said
714 Cowan, who, as respondent has been informed and believes, was interested in this claim of Cowan. In this interview the said Cowan or his agent represented to the said Long that Cowan had paid $15,000.00 under his contract with Smith. During these negotiations the party whom the said Broun and Cowan represented to be a capitalist, anxious to buy the property at $80,000.00, presented himself and expressed his desire to purchase the property, and so conducted himself as to impress the said Long with the idea that he desired to purchase it at the price of $80,000.00; that in consequence of these representations the said Long contracted with the said Broun, as agent of Cowan, to pay $1,000.00 or thereabouts in cash and to give his bonds for a further sum, which would make up $15,000.00. After this arrangement had been consummated, Long insisted that Norris & Long should be credited by the sum of $15,000.00 on their contract with respondent, and under the great straits in which the trust estate was placed, as stated in the bill, respondent entered into an agreement with Long on behalf of Norris & Long, by which he agreed to allow them a credit for whatever sum of money they should be compelled to pay Cowan, not exceeding $15,000.00, at the same time informing them that matters would be litigated and the validity of Cowan's claim contested. Respondent agreed to this, with the distinct understanding that bonds and not negotiable notes were to be executed to Cowan, because the bonds would be subject to all equities against them into whosoever hands they might pass. As respondent has been informed and believes, on the next day after respondent had left New York the said Long changed the contract so as to substitute negotiable notes under certain restrictions instead of bonds for the deferred $14,000.00.

Respondent further states that he has been informed and believes that the alleged capitalist was one Haswall, who was a mere man of straw, and that he afterwards boasted to Mr. Rodgers, of the firm of Bayne & Co., on Broad street, N. *the* York, that — had acted
715 the part of a Pennsylvania capitalis- at the instance of Cowan, and had been instrumental in making Mr. Long buy Cowan's said claim.

Respondent further states that after Cowan, in Dec'r, 1866, or January, 1867, asserted that he had a contract for the purchase of the said land, he caused the clerk of the county aforesaid to search the

records to ascertain whether any conveyance or agreement from any person acting as his attorney was recorded in his office; that the clerk upon such search informed respondent that he could find no such agreement on record. The respondent has not a copy of the first certificate of the clerk — will show he wrote to the clerk in 1870 and got a list of all conveyances or papers on record, but this contract was not named. (See Exhibit No. 17.) Respondent also made search in the said office in person without any success, and it was not until after November, 1870, that respondent ascertained that the said agreement had been recorded in the said office. Respondent has been informed that there was some irregularity about indexing it. Had respondent known that the said agreement had been recorded, or if he had been permitted to see and have a *a* copy of the said agreement, he would long since have taken legal steps to have it cancelled, but from the failure of said Cowan to furnish him a copy of it or to exhibit it to him for so long a time, and after he had been so often required to produce it, and especially after he had acted so long as agent for respondent in trying to sell it and had even contracted to buy it in 1870, respondent did not believe that such a contract was in existence until Nov., 1871.

The respondent further says that he believes it utterly incredible that J. F. Cowan advanced and paid Wm. K. Smith between ten and fifteen thousand dollars in 1866 in the contract between them; that on the day that Cowan claims to have paid the $10,000 named in the contract there is only a receipt on the back of the contract for seven hundred dollars, $200 in money and $500.00 in Cowan's check. This check of $500.00 respondent believes was sent to Dr. F. B. Chewning, who filed the bill to which this is an answer,
716 and it is well known that both Wm. K. Smith and his wife were in greatly straitened circumstances. Had $10,000 been paid as claimed it would have been credited on the contract *or* the less sum. Smith probably deemed the claim inserted in the contract about $10,000 a new recital, or Cowan promised verbally to settle with him, or being under the influence of liquor, as he often was, he did not comprehend its meaning. Smith's letter of May 1st evidently states that no sufficient sum to render it to the interest of parties to carry out the contract had been paid and says they backed out. The respondent does not believe that J. F. Cowan was able to raise or pay the $10,000 or $15,000 claimed to have been paid to Smith, as respondent still holds J. F. Cowan's note for $100.00 (Exhibit 18), dated in 1859, and given to settle a balance on a judgment of $1,000.00, and also holds Cowan's receipt (Exhibit 19) for four notes, amounting to over $2,000.00, given him in 1859 to discount for him and which were discounted by some one in or about July, 1859, and it was not until Dec., 1859, that Cowan, after many evasions, sent him a check for nine hundred and fifty dollars, and he never paid any more on this debt, which is a fiduciary debt and one of honor, and your respondent has often written to him since the war and applied to him personally to pay, but without success, hor has your respondent's attorney (Mr. Churchill, of N. York) been able to find any property out of which

to make the debts, nor could he find Cowan in 1865 to bring suit. Your respondent charges that the contract of Smith or his attorney to Cowan is invalid because he did not confer on Smith the power to make such contract. Smith undertook, among other improper things, to mortgage the land, to receive money, to make a general warranty deed, to make the bonds for deferred payments payable to himself individually, and other things he was not authorized to do, and respondent charges after Long made his contract with Cowan that J. F. Cowan confessed to Long that he knew that Smith had greatly *excluded* his authority under power of attorney, and that if the contract was a valid one he has utterly failed and he is bound to carry it out.

A. G. GRINNAN.

717 ORANGE C. H., *State of Va.*, } *To wit:*

This day personally appeared before me, a justice of the peace, in my county aforesaid, A. G. Grinnan, to me well known, and made oath that this statement- in foregoing answer are true to the best of his knowledge and belief.

R. G. ECKLOFF, *J. P.*

May 13th, 1871.

VIRGINIA, *To wit:*

I, P. H. Fry, clerk of the county court of Orange county, in the State aforesaid, do certify that R. G. Eckloff, Esqr., whose genuine signature is signed above, is an acting justice of the peace for said county, duly elected and qualified, and that full faith and credit are due to all his acts as such.

Given under my hand and the seal of the said court this 13th day of May, 1871.

P. H. FRY, *Cl'k.*

EXHIBIT No. 17, Filed with A. G. Grinnan's Answer.

EXHIBIT No. 17.

EXHIBIT No. 1.

(Copy.)

Know all men by these presents that I, Andrew G. Grinnan, of Madison Co., Va., do hereby nominate and appoint Wm. King Smith, formerly of Fredericksburg, Va., my true and lawful attorney for me and in my name as trustee of Wm. K. Smith to contract to sell the part of Wilson's survey, in Fayette Co., Virginia, lying near Loup creek and the waters of Kanawha river, conveyed me by said Smith in 1857, containing 35,000 acres, more or less; also my interest in said trustee deed in my own right in the Elk Ridge tract on

Armstrong creek, in said county, upon terms stated in my letter of instructions to said Wm. K. Smith of even date herewith.

Witness my hand and seal this 30 day of Oct., in the year 1865.

(Signed) A. G. GRINNAN. [SEAL.]

718 *Copy of Letter of Instructions.*

EXHIBIT No. 2.

LOCK LOMOND, VA., *Oct. 30th*, 1865.

Wm. K. Smith, Esqr.

D'R SIR: I send my power of attorney of even date herewith, authorizing you to contract to sell the part of the Wilson's survey in Fayette Co., lying on or near Loup creek and other creeks south of the Great Kanawha river, containing 35,000 acres, more or less, for the sum of $40,000, clear of commission, and also to sell my interest as trustee or otherwise in Elk Ridge tract and its frontage on the Kanawha river, as stated in said power of attorney, for the sum of $20,000, exclusive of commission, and to contract that upon my receiving the consideration for the land that I shall convey with such title as is vested in me.

Yours truly,

(Signed) A. G. GRINNAN.

EXHIBIT No. 3.

ASTOR HOUSE, N. YORK, *Ap'l* 21, 1866.

Dr. A. G. Grinnan.

MY DEAR FRIEND: I wrote you yesterday enclosing one from Middleton, to which please refer. My object in writing this is to request you by return mail to send an order as trustee for myself and Mrs. Smith to receive the sum of three thousand dollars on the contract for the sale of the 35,000-acre tract of coal lands on the Great Kanawha. As soon as I receive the same, I will deposit $1,000.00 to your credit, that you may draw for the same, with any banker or broker you may name, that Mr. Wallace may get the $500.00 he so much needs, and the other for your own use, and as I wrote yesterday, to hold yourself in readiness, as I think that in some 10 days or two weeks we shall need your presence here to join in the deed of conveyance. I must keep the Dr., who is sick, and Mrs. S.

Y'rs very truly,

(Signed) WM. K. SMITH.

719 *Copy of Order to Sign and Not Signed, E. Va.*

Copy of order to receive money on contract made under power of attorney.

EXHIBIT No. 4.

(Copy.)

Wm. King Smith is here authorized to collect for me as his trustee one thousand dollars from the parties with whom he had made a contract for the sale of the Loup creek (property), West Va., said one thousand dollars being in part payment of said contract under authority given by me to said Smith.

(Signed) A. G. GRINNAN, *Trustee.*

Ap'l 24th, 1866.

Copy — Smith's Letter.

(Co.)

ASTOR HOUSE, *May 1st*, 1866.

Dr. A. G. Grinnan.

D'R SIR: Your favor of the 25th inst. is rec'd, but not in time, I am sorry to say, to prevent some parties from backing square out, as it is called here; in fine, I never saw such a state of things in business matters as exists here at this time. You must be ready to make or cause them to close at once, and pay a sufficient sum, the greater the better, or nothing is certain. They will change their minds if they sleep on it, and then nothing can be done but to look for new parties. I have sold several properties two or three times, and as firmly believed all was right, but all end in smoke or disappointment. I hope, however, to form a new party in a short time. In the meantime, I am suffering very much, and not — to remit Mrs. Smith. As soon as there is a change for the better, I will write. All is confusion now,—1st May; moving time. Remember me very kindly to your good lady, and believe as ever yours,

Very truly,

(Signed) WM. K. SMITH.

720 EXHIBIT No. 6.

(Copy.)

ASTOR HOUSE, NEW YORK, *May 26th*, 1866.

MY DEAR SIR: Your favor of the 25th inst., postmarked 25, is before me. I am truly sorry the sale has not been made, but so it is, and it places me in an unpleasant, most awful condition. Poor wife, poor children. Pray God in his mercy may help us all. Hope for something better by and by. There is no letter or package for

you here. Remember me kindly to your good —, and believe me as ever,

Yours very truly.

(Signed) WM. K. SMITH.

EXHIBIT No. 7, Filed with A. G. Grinnan's Answer.

EXHIBIT No. 7.

31ST BROAD STREET, NEW YORK, *July 9th*, '66.

MY DEAR SIR: Your favor of the 6 p. m. 9th was handed me yesterday on calling at the Astor house. I left the house several weeks since to board in the same house with my nephew, William and wife and boy, Perry, Capt. R. Minor and other friends. I am writing without my glasses. Note your remarks about the law. Nothing can be done for some two months to come, when I hope and believe with the aid of some very influential — you, it will still be sold for a good price. Everybody who can has left the city; I shall for some time. I hope to leave here in a day or two to be absent some weeks, and if I can raise the funds from any other source will write you.

Very truly y'rs,

(Signed) WM. K. SMITH.

Direct to care of Mess. Sam'l Ayers, Son & Co., 31 Broad St., New York.

721 EXHIBIT No. 8.

E—— HOUSE, WASHINGTON, *Dec.* Dec. 31*st*, 1867.

Dr. A. G. Grinnan.

D'R SIR: I have been absent for some time, which is the reason I did not answer your last. I regret, Doctor, that you did not — the hint in my last letter for a quick sale and a price that would warrant it. If you know the quantity of land that is on the market and the desire to realize, you would not hesitate to put the price down to secure a sale. A word to the wise is sufficient. I wish you and yours a very happy New Year.

Very truly your friend,

(Signed) J. F. COWAN.

EXHIBIT No. 9.

(Copy.)

E—— HOUSE, WASHINGTON, *Jan. 7th*, 1868.

Dr. A. G. Grinnan.

D'R SIR: I believe now that I can sell the Wilson tract for $70,000, ½ cash, the balance in one and two years, — 1st mortgage R. R. bonds paying 7 per cent. int., or other good paying stock if you pre-

ferred it. Now send me a map and geologist's report, and let us clear up this old business.

Very resp. y'rs,
(Signed) J. F. COWAN.

Maps and reports were sent but no result.

EXHIBIT No. 10.

(Copy.)

E—— HOUSE, WASHINGTON, *March 9th*, 1869.

Dr. A. G. Grinnan.

D'R SIR: Yours of 5th inst. came to hand yesterday morning and contents noted. In regard to your western lands, I will make 722 inquiries of parties who may want to purchase. Send a full description of your copper lands at once, with the lowest price and terms. I can sell the Kanawha lands for $70,000, one-third cash and the balance in 1, 2 and three years. Let me hear from you at once.

Very respectfully yours,
(Signed) J. F. COWAN.

EXHIBIT No. 11.

(Copy.)

E—— HOUSE, WASHINGTON, *March* 13, 1869.

Dr. A. G. Grinnan.

D'R SIR: Y'rs of the 12th inst. is at hand. I regret that you have sold any land from the tract. I represented to the parties that it contained 35,000 acres, and I gave them a map copied from yours to that effect, and the- offered to give me $70,000 for the land as represented on your map—⅓ cash and balance in 1, 2 and 3 years, secured on the property. The parties are good and are now ——. They will not, however, pay $85,000. If you will send me a corrected map and state a reasonable time, I think something can be done. *Ad me.*

Very respectfully y'rs,
(Signed) J. F. COWAN.

EXHIBIT No. 12.

(Copy.)

E—— HOUSE, *Mar. 30th*, 1869.

A. G. Grinnan.

D'R SIR: I can get $60,000 for the Kanawha property if it is as you state—⅓ cash and the balance on time, secured on the property.

Respectfully,
(Signed) J. F. COWAN.

723 EXHIBIT No. 13.

(Copy.)

Office of J. F. Cowan, No. 119 Broadway.

NEW YORK, *8th Sept.*, 1869.

Dr. A. G. Grinnan.

D'R SIR: I could have sold the property as by your statement for $60,000, ⅓ cash, balance in satisfactory payments, but your failure to answer my letter at the time, made me believe that you did not want me to sell it. I still think I could do it.

Y'rs truly,

(Signed) J. F. COWAN.

EXHIBIT No. 14.

(Copy.)

119 Broadway, Room No. 5.

NEW YORK, 19 *Feb.*, 1870.

Dr. A. G. Grinnan.

D'R SIR: I have been waiting some time to hear from my last communication—(6 Jan.) I have been ready for some time to carry out the contract as stated in your former letter.

Very resp'ly y'rs,

(Signed) J. F. COWAN.

Answer to Cowan's, Dates Feb. 19th, 1870.

EXHIBIT No. 15.

(Copy.)

NEAR ORANGE C. H., VA., *Feb. 27th*, 1870.

J. F. Cowan.

D'R SIR: I understand you to offer $65,000 for the tract of land, ⅓ cash. I will take this clear of all commissions. I doubt not that the buyer can realize $100,000 or more in 6 mo. Indeed, I can show him how to do so. I am desirous of closing the matter, and will submit to the great sacrifice of making the above offer.

724 If parties accept my offer, I wish them to meet me in Washington to close.

Y'rs resp'ly,

(Signed) A. G. GRINNAN.

EXHIBIT No. 16.

(Copy.)

Office of J. F. Cowan, 119 Broadway, Room 5,

NEW YORK, *April 20th*, 1870.

D'R SIR: On my return from Penna. this morning, I found yours of the 16th inst., with your d'ft for $150.00 for acceptance enclosed, which d'ft, as per agreement, as a payment on the contract, is herewith returned to you accepted. The freshet in Penna. will cause some delay in closing matters. I mislaid your d'ft, but will retain when I can come across it amongst my papers. The one which I enclosed, you can sign and enclose, and it will be all right.

Very truly y'rs,

(Signed) J. F. COWAN.

Letter from Cowan about land.

EXHIBIT No. 17.

STATE OF WEST VA., }
County of Fayette. }

RECORDER'S OFFICE, No. 1, 1871.

I, G. M. Blume, recorder, do certify that I have examined records in my said office, and found recorded therein the following conveyance of land by A. G. Grinnan on 25 of Nov., 1868:

A. G. Grinnan, trustee, agrees to convey to Henry Taylor 300 acres of land, reserving right of way, &c. (See page, Book F, 261.) A. G. Grinnan, trustee, conveys to Henry Light, by deed May 25, 1869, 34 acres of land in Wilson survey (recorded Book F, page 337). A. G. G., trustee, conveys — Joel Settle and wife 36½ acres of land, &c. (recorded in Book F, page 295). A. G. G., trustee, 725 conveys to C. A. Settle 27 acres of land, &c. (Book F, page 296). A. G. G., trustee, conveys to Henry Taylor 300 acres, same land as per agreement (Book F, page 261), (recorded in Book F, page 299); no other conveyance being found for said Grinnan upon the records in this office.

Teste: (Signed) G. M. BLUME,
Recorder F. C.

EXHIBIT 18.

(Copy.)

MARCH 15TH, 1870.

Six months after date I promise to pay to the order of A. G. Grinnan one hundred dollars, payable at the Bank of the Republic.

(Signed) JOHN F. COWAN.

EXHIBIT No. 19.

(Copy.)

Rec'd of A. G. Grinnan two notes of —— Osborn and two of McMillands for $510.50 and $515.00, each due at 4 and 6 months, for sale at one per cent a month less interest, June 21, 1859.

(Signed) JOHN F. COWAN.

WEST VIRGINIA, *ss:*

I, Jonathan Mays, clerk of the circuit court of Greenbrier county, certify that the foregoing is a true copy of the bill of the complainant and exhibits filed therewith (excepting Exhibit No. 3 not found in the papers) and the answer of defendant, Andrew G. Grinnan, with the exhibits filed therewith, as taken from the records and papers of my office in the chancery cause of F. B. Chewning, plaintiff, against J. F. Cowan and others, defendants.

J. MAYS, *Cl'k.*

(Fee for this record, $10.00.)
(Record printed September 16th, 1881.)

726 (Endorsed:) "Printed record, Jonathan Mays." Copy of printed record filed May 4, 1887. L. B. Dellicker, clerk.

727 UNITED STATES OF AMERICA, *ss:*

The President of the United States to A. G. Grinnan, The Forest Hill Mining and Manufacturing Company, Robert Soulter, trustee; William Wyant, and the unknown heirs of William K. Smith, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to an order allowing an appeal filed in the clerk's office of the circuit court of the United States for the district of West Virginia, wherein John Halstead is appellant and you, with others as aforesaid, are appellees, to show cause, if any there be, why the decree rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this eighth day of November, in the year of our Lord one thousand eight hundred and eighty-nine.

MELVILLE W. FULLER,
Chief Justice United States.

728 Service of the within citation accepted for Wm. Wyant, def't, J. F. Broun, att'y, Nov. 11, 1889, and S. A. Miller, of counsel for A. G. Grinnan, Nov. 11, 1889.

Service of the within citation accepted for The Forest Hill Mining and Manufacturing Company and Robert Soulter, trustee, by A. Burlew, att'y, Nov. 11th, 1889.

729 The United States of America to A. G. Grinnan, trustee; S. C. Long, G. W. Norris, P. W. Morgan, late sheriff of Kanawha county, and as such adm'r of William K. Smith, deceased; Gustavus B. Wallace, Edward Carter, Patsey Dellard; the personal representative of William J. Roberts, whose name is unknown; Jas. Gray, Louisa B. Hoc, and William H. Fitzhugh, ex'r of H. H. Parton; —— Emanuel (whose baptismal name is unknown), adm'r of H. Philips; George Hamilton, F. B. Chewning, in his own right and as adm'r of Abigail H. Smith; T. L. Broun, and all creditors of William K. Smith whose debts are acknowledged in writing by him to be just, impleaded with A. G. Grinnan; the Forest Hill Mining and Manufacturing Company, Robert Soulter, trustee; William Wyant, and the unknown heirs of William K. Smith, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to an order allowing an appeal filed in the clerk's office of the circuit court of the United States for the district of West Virginia, wherein John Halstead is appellant and you, with others as aforesaid, are appellees, to show cause, if any there be, why the decree rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 12th day of February, in the year of our Lord one thousand eight hundred and ninety.

MELVILLE W. FULLER,
Chief Justice of the United States.

730 Service accepted for Wm. Wyant to have the same — as if served by the U. S. marshall on said Wyant.
March 11, 1890.

J. F. BROUN, *Att'y.*

Service accepted for the Forest Hill Mining and Manufacturing Co., John Halstead, & Robert Soulter, trustee.
March 11, 1890.

A. BURLEW, *Att'y.*

Service accepted for F. B. Chewning in his own right and as administrator of Abigail H. Smith.
March 22, 1890.

JOHN W. HARRIS, *Att'y.*

Served the within citation on A. G. Grinnan, trustee; J. F. Cowan, S. C. Long, J. W. Norris, Abagail Smith, —— adm'r of William K. Smith and the creditors of William K. Smith by delivering a true

copy thereof to Wesley Mollohan, att'y of the late firm of Mollohan & Jackson, att'ys of record for said parties, this 2nd day of April, 1890, the said parties being non-residents of the district of West Virginia and not found therein; and as to Gustavus B. Wallace, Edward Carter, Patsey Dillard, the personal representative of *of* William J. Roberts, Louisa B. Hoc, and William H. Fitzhugh, ex'r of H. H. Parton; —— Emanuel, adm'r of H. Philips, and George Hampton, not served because said parties have not been found and it is reported that said parties are non-residents of the district of West Virginia.

R. C. DAWSON,
Dept. U. S. Marshal.

Marshal's fees, $2, paid by A. Burlew.

Service accepted.

THOS. L. BROUN.

Service accepted.

P. W. MORGAN,
Administrator.

Endorsed on cover: Case No. 14,069. West Virginia C. C. U. S. No. 370. John Halstead, appellant, *vs.* A. G. Grinnan *et al.* Filed July 2nd, 1890.

370

Office Supreme Court U. S.
FILED.
FEB 23 1893
JAMES H. McKENNEY,
CLERK.

SUPREME COURT

OF THE

UNITED STATES OF AMERICA.

JOHN HALSTED, Appellant,

vs.

A. G. GRINNAN, ET AL., Appellees.

IN CHANCERY.

GAZETTE PRINT, CHARLESTON.

Supreme Court of the United States of America.

.....

JOHN HALSTED, Appellant,

vs.

A. G. GRINNAN, ET AL., Appellees.

} IN CHANCERY.

... .

To the Honorable Judges of the Supreme Court of the United States :

I submit the following brief and points as attorney for the appellant, John Halsted.

This cause was heard upon its merits before the District Court of the United States for the District of West Virginia, holden at Charleston, on the 26th day of May, 1888, when the court made its decrèe, as follows :

"These causes,

John Halsted vs. Wm Wyant and others, in equity.
A. G. Grinnan vs. S. C. Long and others, in equity.
Chewning vs. J. L. Cowan and others, in equity.

this day came on to be heard together and were argued by counsel; whereupon, upon consideration hereof, it is adjudged, ordered and decreed that the bill and amended and supplemental bill, in the first above mentioned causes, be and the same is hereby dismissed, and that the

defendants therein recover of the complainant, John Halsted, their costs about their defense in that behalf expended."

"And it is further adjudged, ordered and decreed that the petition for rehearing filed in said second and third suits above mentioned, and the rule awarded said Halsted in said suits against the defendant, William Wyant, be each of them and the same are hereby dismissed; and it is further adjudged, ordered and decreed that the defendants in said petition and said rule respectively recover their costs against said Halstead." Record, page 192.

That on the same day John Halsted filed his petition in said causes praying that said causes be reheard, and in support of said petition be also filed certain affidavits and map hereinafter referred to. Record, page 193-4.

And on the 27th day of May, 1889, said court made its further decree in said causes as follows:

"These causes came on this day to be further heard upon the petition filed by John Halsted to re-hear the decree entered in said causes on the 26th day of May, 1888, and upon the affidavit of A. G. Grinnan and exhibits attached thereto, and the affidavit of John Halsted, R. M. Eames, Henry H. Eames and exhibits accompanying the same, now ordered to be filed."

"And thereupon, upon consideration thereof, it is ordered, adjudged and decreed, that the said motion be refused and that the said petition to rehear said causes be dismissed, and that the defendants recover of the said Halsted their costs about their defense of said motion expended." Record, page 192.

From these two decrees the complainant John Halsted, has appealed to this court.

In order to determine whether there is error in these decrees, or either of them, it will be necessary to examine the pleadings, exhibits, depositions and other papers filed in this cause, and to some extent the pleadings, papers and decrees filed and made in the causes of Chewing *vs.* Cowan and Grinnan *vs.* Long and others, with which this cause was heard.

The complainant's original bill in this cause will be found in the printed record on pages from 1 to 4.

That bill avers:

That on the 27th day of October, 1860, Geo. P. Huddleston executed and delivered to A. G. Grinnan, a deed for *200 acres of land*, "*more or less*," lying on the Kanawha river, in Fayette county, Virginia; a copy of which deed is made a part of the bill. Record, page 5.

That the aforesaid conveyance was made in pursuance of a "*contract*" made sometime previous, between A. G. Grinnan and Geo. P. Huddleston.

That on the 15th day of June, 1859, W. K. Smith and wife and A. G. Grinnan and wife and A. G. Grinnan, trustee, conveyed by deed to

the Forest Hill Mining and Manufacturing Company, 2,000 acres of coal and timber land known as "The Forest Hill Tract," lying in the county of Fayette, just below Armstrong creek, a copy of which deed is filed with the bill. Record, page 6.

That by the last mentioned deed the grantors conveyed also to the Forest Hill Mining and Manufacturing Co. a part of the Huddleston tract of *200 acres*, above referred to, described as follows: "*A certain piece or parcel of land known as the Huddleston tract to be surveyed off the western side of said tract by a line running from the northerly to the southerly side of said tract, to be bounded on the south by the tract hereinbefore conveyed, and on the north by the Great Kanawha river and containing 100 acres, more or less.*" The tract "hereinbefore conveyed" as the southern boundry of the part of the Huddleston tract is the Forest Hill tract of 2,000 acres.

That the part of the Huddleston tract intended to be conveyed to the Forest Hill Company, by this deed, was the *undivided one-half*, to be laid off as above described.

That on the 15th day of June 1859, the Forest Hill Company conveyed the Forest Hill tract of 2,000 acres, and the one-half of the Huddleston tract, to be laid off according to the calls of the deed from Smith and others to the Forest Hill Company to Robert Soulter, trustee, a copy of which deed is made a part of the bill. Record, page 11, etc.

That on the 6th day of June 1864, Robert Soulter, trustee, conveyed the same lands conveyed to him as aforesaid to John Halsted, a copy of which deed is made a part of the bill. Record, page 13, etc.

That the property was purchased as a coal property, but it has never been operated and has lain idle since the purchase by the Forest Hill Company, in 1859, and, therefore, neither the said company nor its grantees had any occasion to examine into the running of the lines, or the laying off the one-half of the Huddleston tract until a comparatively short time ago Nor have they had any occasion or necessity to have the one-half of the Huddleston tract actually laid off and separated from the other part thereof.

That your orator now desires to have the *one-half* of the Huddleston tract laid off in accordance with the deeds above referred to, and according to your orator's just and equitable rights in the matter.

That whatever claims William Wyant has to the said *one-half* of the Huddleston tract, have been obtained with *full knowledge* of the *rights* and *claims* of your orator.

That the said Forest Hill Mining and Manufacturing Company took *possession* of said lands on its purchase as aforesaid, and the said company and its aforesaid grantees *consecutively, have had possession of the same to the present time.*

Several years ago your orator was informed a division line was attempted to be run by some party, separating the *one-half* of the said Huddleston tract purchased by the *Forest Hill Company* from the *other-half* of said tract, but on investigation your orator has discovered that said survey was never completed.

Your orator is now advised that said Grinnan claims the said division line separating the *part purchased* by the *Forest Hill Company* from the remaining part of the Huddleston tract in such a way as to leave a *narrow strip* of land lying *between the said 2,000 acre* tract and the said *frontage* as part of the land *retained* by said Grinnan, thus *cutting off* the said *Forest Hill tract* from *communication* with the *Kanawha river* to *avoid* which, the said *one-half* of the Huddleston tract was purchased.

That said division line *was not run* at the instance of said *company or its grantees, nor were they present when said line was run*, but said line so far as it was run *was at the instance* of said *Grinnan.*

Your orator *charges* that said *division line was run* in part so as to separate the front from the back land of said company, *in violation of the requirements of the deed from Smith & Grinnan* to said company by *accident* or *mistake*, or by *fraud* or *deceit of said Grinnan.*

That said Smith has departed this life, that his heirs are unknown, and that he parted with his entire interest in said properly to said Grinnan.

That the laying off of said tract is a proper subject for equitable relief and that remedy at law would be incomplete and uncertain.

PRAYER OF BILL.

That William Wyant be compelled to disclose what claim he has to any part of the Huddleston tract purchased by your orator; that the said *one-half* of the Huddleston tract be run out and laid off, in conformity with the deed from Wm. K Smith and others to the Forest Hill Company, so as to connect the said one-half with the 2,000 acre tract, and that your orator may be quieted in his title, and he prays general relief.

On the 7th of December, 1885, A. G. Grinnan and William Wyant filed their respective answers to said bill. Record, page 20.

The answer of Grinnan will be found commencing on page 20 of the record, and the answer of Wvant commencing on page 25.

The answers of Grinnan and Wyant admit the principal allegations of the bill, concerning complainant's title and set up matters of avoidance and disclosed that Wyant claimed to have purchased a part of the Huddleston tract and a part of the land claimed by John Halstead under a decree made by the Circuit Court of Greenbrier county, in the case of Grinnan vs. Long, and Chewning vs. Cowan.

John Halsted had been made a party to the suit of Grinnan vs. Long, in Greenbrier county, and had been proceeded against as a non-resident by order of publication, and had not appeared in said cause, and consequently, when the answers of Grinnan and Wyant to his bill disclosed that a part of the lands claimed by him, had been sold in said causes in Greenbrier county, he appeared in the said Circuit Court of Greenbrier county, on the 3d day of November, 1886, and tendered his petition in said causes, praying that said causes be reheard, especially two decrees which had been made in said causes, as provided by statute, section 14, of chapter 124, of the Code of W. Va., and said petition was ordered to be filed. (See petition in record, page 54, and order filing same on page 93.)

And thereupon said Halsted tendered his answer in said causes (Record,93) and on the 10th day of November, 1886, he tendered his petition and bond in said causes for the removal of the same to the District Court of the United States for the District of West Virgtnia having Circuit court powers. (Record, page 71-2) and on the 17th of November, 1886, an order was made by the said circuit removing said causes to the District court of the United States for the District of West Va. Record 94.

On the 4th day of May, 1886, the said causes were docketed in the said District court, for further proceedings to be had therein. Record, page 52.

On the 23rd of May, 1887, an order was made in said district court directing that said causes so removed into said district court, and the said suit of John Halsted against A. G. Grinnan and others, be heard together and that any depositions thereafter taken in either of said causes, shall be read and considered on the hearing of either of said causes Record, page 97.

On the 30th day of November, 1887, the suit was dismissed as to the unknown heirs of Wm. K. Smith on the ground that they had no interest in the matter in controversy. Record, page 178-9.

That on the 30th of November, 1887, John Halsted tendered his amended and supplemental bill, in his said cause against A. G. Grinnan and others which was ordered to be filed, without exceptions being made thereto. Record, page 179. This bill recapitulates the original bill, with some slight variations, and contains considerable new matter, the principal allegations of which bill are as follows:

That in 1853 Wm. H. Edwards and wife conveyed to Wm. K. Smith 7,000 acres of land known as "Elk Ridge Tract," which contained within its boundaries the "Forest Hill Tract" of 2,000 acres. That in 1857 Wm. K. Smith and wife conveyed to A. G. Grinnan one *undivided half* of the Forest Hill tract together with the undivided half of 200 acres known as the Huddleston tract. "Ex. C. C., 272.

That on the 29th of October, 1857, Wm. K Smith conveyed to A. G. Grinnan, several tracts, including the interest of said Smith in the Elk Ridge tract, "also the *remaining half* of a tract of about *200 acres* of land, *contracted* to be conveyed to W. H. Edwards for the benefit of Smith by George Huddleston." Record, page 10.

That prior to the sale of the 7,000 acre tract by Edwards to Wm. K. Smith, Edwards had made a *written contract* with George Huddleston for the purchase of the Huddleston tract of "*200 acres*" for the benefit of said Smith as an *outlet* for the 7,000 acres to the Great Kanawha river, as the 7,000 acres only come within about three-fourths of a mile from said river.

That on the 15th day of June 1859, Smith and Grinnan conveyed the Forest Hill tract to the Forest Hill Company. And the part of the Huddleston tract conveyed to by said deed is set out in full in this amended bill as in the original bill.

By this deed it was intended by all parties to divide the Huddleston tract in *equal parts* so as to give the western half to the Forest Hill Company and thus give an outlet for the Forest Hill tract to the Kanawha river. The Huddleston tract had been conveyed as a tract containing "*about 200 acres*," and it had been purchased by *halves* by Smith, and was described as a tract containing "*200 acres more or less*," and the words "more or less" were inserted in the deed to the Forest Hill Company for the purpose of securing to the company one-half of whatever the number of acres exceeded 200 and to confine it to *one-half* of the number of acres therein should the tract contain less than 200 acres.

That at the time Smith and Grinnan made sale of said lands to the Forest Hill Company in 1859 they exhibited said land by a map, pur-

porting to have been made by Dr. J. H. Salisbury, which map they represented as showing the true location of the Huddleston tract, the Forest Hill tract and their relation to each other, and the report as showing the quality of minerals, etc. Said map is made a part of the bill marked "Ex. A." and is described in the record as "The Forest Hill Elk Ridge." Record, page 134.

The lines represented on said map by the figures 5, 6, 7, 8 and back to 5, were reported as showing the true location of the Huddleston tract and its relations with the Kanawha river and the Forest Hill tract.

The deed was made and delivered in conformity with this map, and the deed and map were delivered to said company by said Grinnan, practically as one paper, and the company believed said map correctly represented the location of the lands purchased by it By reference to said map it will be seen why it was that the western half of the Huddleston tract was conveyed to the Forest Hill Company, and why it was also that the eastern half was retained by Smith and Grinnan.

The Elk Ridge tract was retained by Smith and Grinnan, and the easter half, only, of the Huddleston tract would border on the Forest Hill.

That on the 27th of October, 1860, George Huddleston executed and delivered to A. G. Grinnan in his own right and as trustee for W. K. Smith, a deed for the Huddleston tract, "containing 200 acres be the same more or less," in accordance with the before mentioned "*contract*" made between Edwards and Smith. This deed was admitted to record in Fayette county, on the 6th day of October, 1860. Record, page 5 and 6

That on the day Smith and Grinnan made their sale to the Forest Hill Company, said company executed a deed of trust to Robert Soul er, trustee, for the same lands embraced in the said deed from Smith and Grinnan, and said deed of trust was also regularly recorded in said county, on the 27th day of June, 1859. Record, page 11.

The deed of trust was given to secure the payment of some individual notes, and 80 of the company's bonds for $500 each, 28 of which were to become due in 1862, and 26 in 1864 and the residue, 26, in 1867, and the proceeds of the sale of the company's lands were to be distributed, first, to the payment of the bonds to become due in 1862 and 1864 *prorata*, and after they were paid, then, second, to the payment of the bonds to become due in 1867. That John Halsted owned all the first and second reries of bonds except three. That on the 6th day of June, 1864, the company's lands were sold under the deed of trust by

the trustee and were purchased by John Halsted and he procured a deed therefor from said trustee, on the day of sale. See deed, also referred to on page 11 of record.

That shortly after the purchase of the lands by said company in 1859, *Grinnan, whose duty it was* to have that part of the Huddleston tract so purchased, properly laid off to it by a proper survey, *undertook* to so lay it off, or *professed* to do so, and said company believed he had complied with his agreement and run the division lines so as to give to said company the land it had purchased, until it was discovered several years after the war a serious mistake had been made by *T. S Robson, surveyor*, whom *Smith* and *Grinnan* had employed to divide the Huddleston tract.

That the mistakee was not discovered sooner on account of the war, and the company did not resume business after the war, and the property was sold in 1864, so that the company had no occasion to examine the lines run by Robson in 1859, except to see that they were properly run for a *short distance back from the river*, about *one thousand feet*, where it was about to locate its buildings for the manufacture of coal oil. *It took no part in running the division lines in 1859 except to see that they were properly run through the bottom land on the river*, for the reasons above stated, and *did not* accompany the said surveyors further on his way, but said *company supposed*, as a matter of course, until the mistake was discovered, that A. G. Grinnan had had the Huddleston tract divided according to his agreement with, and his deed to, said company.

The company took *possession* of the *whole lands purchased by it from Smith and Grinnan*, according to the *calls from the deed* from them; by erecting buildings of various kinds on the *bottom next to the river* and various other improvements as far back as the *foot* of the *hill* or mountain a distance of about 1,000 *feet*, and by *occupying* said improvements, and *other improvements* at other places on the said lands by *actual occupancy, notoriously claiming the whole of the lands embraced in its said deed according to its calls*, except during a period of the war when it was compelled to abandon them, until they were sold in 1864. since which time your *orator* has been in *continuous, uninterrupted and undisputed occupancy* of the *whole* of said lands by *actually* and *openly occupying* the same to the present time, *notoriously claiming* them to the *same exterior lines* as claimed by said company, according to the *calls* of the *company's said deed* of *June 15th, 1859*.

That as soon as said company became aware that in laying off the

Huddleston tract the surveyor had disregarded the requirements of the said deed to said company of June 15th, 1859, and by mistake or misdirection of Smith and Grinnan, had laid off said land in violation of said deed, it *repudiated* that part of the survey which disregards the requirements of said deed; and in like manner *your orator* has *repudiated* said survey since he was informed of said error.

The map filed with the depsosition of T. S. Robson, marked "T. S. R. No. 2," was made from a survey made by said Robson in 1861, and your orator believes it shows correctly, the location of the Forest Hill tract of 2,000 acres, and the Huddleston tract and the division attempted to be made by him in 1859, and their relations to each other, Record. 48.

It will be seen by this map that the division of the Huddleston tract which was attempted to be made in 1859, is so made that the part retained by Grinnan *intercepts* that *part laid off to the Forest Hill Co.* from the *Forest Hill tract* of 2,000 acres, so that they do not join each other. That your orator first saw said map in 1867. Your orator says the first time he has any recollection of Grinnan ever setting up any claim to the strip of land which separates the part of the Huddleston tract, laid off in 1859, from the Forest Hill tract of 2,000 acres, was in *1883*, after the sale had been made to Wyant, and even then he did not claim ownership of said land, but he refused to make any correction on the plea that the Forest Hill Co. had defaulted in the payment of the bonds, and said as your orator was then the owner of the property, he (your orator) stood in the company's shoes and could not ask a court of equity to correct the error made by the surveyor in 1859, because of the failure of the company to pay its bonds.

Your orator has been informed since the filing of his orignal bill in this cause, that in the year 1878, A. G. Grinnan filed his bill in the circuit court of Fayette county, against S. C. Long and others and about the same time L. B. Chewning filed his bill against J. F. Cowan which causes were consolidated and removed to the circuit court of Greenbrier county, in 1880. That the object of these suits was a settlement of the trust estate held by Grinnan in Fayette county.

That on the 10th day of July 1882 a decree was made in said causes for a sale of the said trust estate and John W. Harris was appointed a special commissioner by the court with instructions to sell the said estate including "*one undivided half* of the tract called the *Huddleston*

tract," and said commissioner in executing said decree sold "*the one undivided half*" of said property according to a division he had made, to Wm. Wyatt, and reported the sale to the court for confirmation as a sale of the "*one undivided half of the Huddleston tract,*" ascertained to contain 154½ and 9 74-160 acres lying adjacent, which he reported the "former owners" of the Huddleston tract claimed as a part of it: the part sold by said commissioners is that part lying east of the dividing line as represented on the said map marked "T. S. R. No. 2" (Record, page 48.) In other words the commissioner sold according to the division attempted to be made in 1859, which includes lands which had been conveyed to said company by the said deed of June 15th, 1859; thus separating the one-half purchased by the Forest Hill Company from the Forest Hill tract of 2,000 acres and violating the said decree of July 10, 1882, under which said sale was made.

That said Wyant has not paid the last installment of purchase money for the land, amounting to about $3,500.00 with considerable interest thereon, and only has an equitable title therefor

That your orator was made a party to the suit of Grinnan against Long and others by an order of publication, and was not served with process and that he did not appear to the cause before said sale or confirmation was made, for the reason that he was informed by A. G. Grinnan that the said suit did not affect your orator's interest in any way, but that your orator had been made a party as a mere matter of form and your orator had no knowledge that any part of the lands he owned or was interested in was being proceeded against or involved in said suit until after said sale had been made to Wyant in 1883 and confirmed.

That on the 1st day of November, 1886, your orator filed his petion in said causes in the circuit court of Greenbrier county for a re-hearing of the proceedings including the decree for the sale of the "one undivided half of the Huddleston tract" and the decree of confirmation, dated April 27th, 1883. That at the same time he tendered his answer in the said cause of Grinnan against Long and his petition for the removal of said causes into the District court of the United States for the District of West Virginia, and that during the same term of the court, the said petition and answer were filed, and in said causes an order was made by said court directing the removal of said causes unto the said Federal court at Charleston, and said causes were accordingly removed into said court and ordered to be heard with the said suit of your orator.

That Wm. Wyant had constructive notice, that in the year prior to October 1st, 1857, Wm. H. Edwards entered into a "*written*" contract with George Huddleston, for the benefit of W. K. Smith, for the purchase of the Huddleston tract

That Wyant had also constructive notice at the time he purchased the land in controversy; that in accordance with said contract, Wm. K. Smith on the 1st day of October, 1857, conveyed, among other lands, *one-half* of the Forest Hill tract and the *undivided half* of the Huddleston tract to A. G. Grinnan.

That Wyant also had constructive notice that on the 29th day of October, 1857, Smith conveyed to Grinnan "the *remaining half* of 200 acres of land," being the remaining half of the Huddleston tract.

That said Wyant had actual knowledge of all the conveyance referred to in this bill, and of the location with reference to each other, including the said *written contract*, for the purchase of the Huddleston tract, for the benefit of Wm. K. Smith, and the deed from said Smith and Grinnan to the Forest Hill Co., dated June 15th, 1859, for all said deeds, and contract, were fully set out or referred to in the record of the cause, through which he made his purchases from Com'r Harris, and the law forced upon him knowledge of what the record of the causes contained.

Your orator charges that Wyant cannot hold any part of the land he purchashed from commissioner Harris which had been conveyed by Smith and Grinnan to the Forest Hill Company by the deed of June 15th, 1859, because he had both *actual* and *constructive* notices of the sale and conveyante of said land to said company. Also because he is not a *bonafide* purchaser *witout notice* of your orator's title: he has not the legal title to said land, nor has he paid the purchase money therefor, also because he purchased from one (Grinnan) who had notice of your orator's title, to the land and your orator was in *open possession* of the land by *actual* and *undisputed occupancy, claiming* to the *entire extent of his boundaries*, which was notice sufficient to put him on inquiry.

Also because at the time the survey was made by Robson in 1859, the company's *entire property* had been conveyed to a trustee, to secure the payment of a *large number of bonds* and other personal notes, amounting to over *$40,000*, and said property was then held by said trustee for the payment of said notes and bonds which was a *bar* to any *charge* being made even by the consent of the company that would *depreciate* the *value* of the property. Also because his purchase was so for as he claims land which had been conveyed to said company, is in

violation of the decree under which he made his purchase. Also because *Wm. Wyant* so far as he claims lands under his purchase which had been conveyed by Smith and Grinnan to the Forest Hill Company under the deed of June 15, 1859, *is not an innocent purchaser* and his purchase is *tainted* with *fraud*.

Your orator is advised that a court of equity will look at the necessity that exists on the part of your orator to have the *land itself* which he purchased and *paid his money for*; that said land is most indispensible to your orator and without it great injustice will be done him, etc.

PRAYER.

That the sale of the land to Wm. Wyant, so far as it affects your orator's rights, be set aside and held for naught, and the undivided half of the Huddleston tract purchased by the Forest Hill Company from Smith and Grinnan be laid off to your orator according to the said deed from Smith and Grinnan to said company dated 15th June, 1859, etc.

The answer of Grinnan to the amended bill of John Halsted, will be found in record, commencing on page 187. Wyant made no answer to it.

The lands that Commissioner Harris sold to William Wyant are represented on the map which will be found in the printed record on page 52 within the lines shaded yellow, and the triangles distinguished as containing 9 $\frac{74}{160}$ acres, and the lines on said map shaded red represent the part of the Huddleston tract that said commissioners did not sell. See report of Commissioner Harris, page 46, and Report of Surveyor Tucker, commencing on page 47.

The defendants Grinnan and Wyant, by direct admissions, and by not denying, admit the following allegations made in said original and amended bills.

(1) That in 1853 Wm. H. Edwards conveyed by deed to Wm. K. Smith 7,000 acres of land, known as the "Elk Ridge tract" lying in Fayette County Virginia, and that this tract contained within its boundaries the Forest Hill tract of 2,000 acres.

(2) That on October 1st, 1857 Wm. K. Smith and wife conveyed to A. G. Grinnan one undivided half of the Forest Hill tract being that part of the 7,000 acre tract which will include one-half the frontage of said tract towards the Kanawha river, etc., together with the undivided one half of two hundred acres, lying between the said 7,000 acres and the Great Kanawha river, known as the "Huddleston tract." See deed in record on page 272 marked "C. C."

(3) That on the 29th day of October, 1857, Wm. K. Smith conveyed to A. G. Grinnan, several tracts of land, including the interest of said Smith in the Elk Ridge tract of 7,000 acres, "also the *remaining half* of a tract of about 200 acres of land lying on the Kanawha river below Armstrong Creek, being the tract "contracted" to be conveyed to Wm. H. Edwards, for the benefit of Smith by George Huddleston." "Ex. C." Record, page 59.

(4) That prior to the sale of the 7,000 acre tract by Edwards to Smith, Edwards had made a *written contract* with George Huddleston for the purchase of the Huddleston tract of 200 acres, for the benefit of Smith, as an *outlet* for the 7,000 acres to the Kanawha river, and that said contract was made prior to October 1st, 1857.

(5) That on the 15th day of June, 1859, Smith and Grinnan conveyed the Forest Hill tract, and the part of the Huddleston tract, as described in the deed of conveyance, referred to and described in said bills, but they deny that it was the intention of the parties by this deed to convey *one-half* of the Huddleston tract

(6) That at the time Smith and Grinnan made sale of the land to the Forest Hill Company in 1859, they exhibited said land by a report and map, purporting to have been made by Dr. J H. Salisbury, which map they represented as showing the true location of the Huddleston tract, the Forest Hill tract, and their relation with each other and with the Kanawha river, and that said deed, report and map were presented to the Forest Hill Company practically as one paper, and that said company believed the said map correctly represented the location of said lands.

(7) That the lines represented in said map by the figures 5, 6, 7, 8 and back to 5 were represented by Smith and Grinnan at the time they made their sale to said company to correctly describe the Huddleston tract, and its relations with the Forest Hill tract and the Kanawha river.

(8) That the map filed with complainant's bill marked "T. S. R. No. 2," shows the *actual* location of the Huddleston tract, and its position in regard to the Forest Hill tract and the division attempted to be made by Robson in 1859. Record, 148

(9) That on the day Smith and Grinnan conveyed said lands to the Forest Hill Company—15 June, 1859—said company executed a deed for said lands to Robert Soulter, trustee, to secure the payment of a large number of its bonds, amounting to over $40,000, and that

Halsted was the owner of all the first and second series of said bonds except three.

(10) That said company's lands were sold by said trustee to John Halsted on the 6th day of June, 1864.

(11) That the decree of the Circuit court of Greenbrier county required Commissioner Harris to sell an *undivided half* of *the Huddlesten tract*, and under said decree said commissioner undertook to sell to William Wyant 163½ acres, or 29 acres more than one-half of said tract, and 58 acres more than is embraced within the boundaries of land laid off by Robson in 1859.

(12) That Wyant has not paid the last installment of purchase money, amounting to $3,500 with interest thereon, and has only an equitable title to the land.

I find no replications in the record to the answers of Grinnan and Wyant to complainant's original bill, but they were treated as filed on the hearing of the cause in the court below.

So far, however as they admitted the allegations of the bill, no replications were necessary. And so far also as they set up matters not directly responsive to the bill in *defense* and *avoidance*, the answers were no proof of the facts so stated. 6 Wall 299

Story's Equity Jurisp. section 1529 and cases there cited.

Grinnan and Wyant are estopped from taking any advantage of the omissions of the record, to show that replications were filed to the said original answers, for the reason that they took the depositions of witnesses, as if there had been replications to said answers. 7 Wall. 212

"No decree shall be reversed for want of a replication to the answer, where the defendant has taken depositions as if there had been a replication."

Chapter 134 of the Code of W. Va., section 4.
Chalfants vs. Martin, 25th W. Va R., p. 397. 112 U.S. 405

On 25th November, 1887, a rule was awarded in said cause in said U. S. District Court, against Wm. Wyant, requiring him to appear and show cause why the decree of sale and decree of confirmation should not be set aside, (Record, p. 178); and Wyant in answering said rule, made his original answer to the original bill of John Halsted, a part of his answer. To this answer complainant, Halsted, replied generally. Record, 190, 191.

While this replication was to the answer of Wyant to the said rule,

it was in effect, also, a denial of every allegation which he made in his said original answer which was not directly responsive to the bill, as if it had been more formally pleaded.

To the answer of Grinnan to the amended bill, the complainant replied generally. Record, page 179.

Not having answered the amended bill, Wyant was as to all new matter, which said amended bill contained, in the same position in which he would have been, if he had failed to answer the original bill Rule of practice in equity, 46. And as to all new matter in the amended bill, it should have been taken for confessed as to him, and a general replication having been filed to the answer of Grinnan to the amended bill, he was put to the proof of every allegation in said answer not directly responsive to the amended bill.

The matters set up in the answers of Grinnan and Wyant, in defense and avoidance, which required proof by independent testimony, independent of any general replications to said answers, are as follows:

(1) That at the time of the conveyance by Grinnan to the Forest Hill Company, the members and the president sent John McKenney from New York City to Fayette county, Virginia, to lay off the 100 acres of the Huddleston tract, which Smith and Grinnan had conveyed to said company, and that he went to Fayette county as the agent of John Halsted and others, and of Grinnan.

(2) That as such agent McKenney employed T. S. Robson, surveyor, and did lay off the said 100 acres of the Huddleston tract.

(3) That two members of the Forest Hill Company were present, as agents of the company, and that McKenney directed the laying off of the dividing lines with them.

(4) That the plat of the 100 acres was returned to the members of the Forest Hill Company in New York.

(5) That they approved the action of their agent and took possession of the 100 acre tract and held it by its lines separate and distinct from the other part of the Huddleston tract.

(6) That Grinnan has held undisputed possession of the remaining part of the Huddleston tract for more than twenty years.

(7) That Halsted took possession of said 100 acre tract and held possession thereof only by the lines of said plat.

(8) That Halsted bought with full knowldge of said dividing lines.

(9) That the Forest Hill Tract could only be mined to advantage by

ways along Armstrong creek, through Elk Ridge tract, it having no river frontage.

(10) That about the year 1875 Grinnan filed his bill in chancery in Fayette circuit court against Cowan and Long and others, to which bill he made John Halsted a defendant, and that it was under a decree made in that cause that the 125 acres was sold to Wm. Wyant for $9,324.56, and that Halsted can not now set up any claim to said 125 acres.

(11) That immediately after said land had been laid off, said company caused a plat to be made of the 105 acres so laid off and sent a copy of the same to Grinnan.

(12) That C. F. Hale, a member and agent of said company, was present directing the location of the dividing lines, having full knowledge, &c., the said company, and after it said Halsted at all times claiming the 105 acres, and said division lines to be as run and located and holding possession of said 105 acres up to said line.

(13) That by reason of the fact that the legal title to the Huddleston tract was acquired by Grinnan and others after the deed to said company was executed, Wyant is not affected with notice by reason of the recordation.

There is much more that might be alled to this character of defense set up in the answers of Grinnan and Wyant and the Court will observe that the main reliance of the defendants to defeat the complainant's bill is in setting up *other facts in defense and avoidance.*

Stripped of verbiage, the questions involved in this case are these:

(1) Did Smith and Grinnan convey to the Forest Hill Company, with covenants of general warranty, the Forest Hill tract of 2,000 acres and the Western half of the Huddleston tract, to be laid off as stated in the bill? And in answering this question, it is not material whether 100 acres or the western half were to be conveyed.

(2) Has the title which the Forest Hill Company acquired by the deed from Smith and Grinnan to the two tracts of land come down by proper conveyances, to John Halsted? And if it has, then

(3) Has Halsted, either by omission or commission, deprived himself of the right to any part of the lands which he acquired through his deed from Robert Soulter, trustee?

(4) Is Halsted estopped from asserting his claim to the whole lands which he purchased from Robert Soulter, trustee, on account of the sale made by Commissioner Harris in the suits in Greenbrier circuit court?

To support the bill the complainant, Halsted, has taken the depositions of four witnesses, Dr. Chas. F. Hale, Richard M. Eames, John Halsted and John L. Cole.

Charles F. Hale, in his first deposition given in the cause in record commencing on page 119, testified substantially as follows:

That he came to Fayette County, West Virginia, in 1859, and has lived in said county since, except that he was absent during the war, lived in New York city before coming to West Virginia, that he was president of the company, and owned one tenth part of it, and that the company was organized in 1854, and stopped work in 1861. Sixth question to the witness: Examine the copy of deed filed with the complaintant's bill, marked "Ex. B," and state what you know about the lands therein described and what relations you have had with them and how long? Answer: I know all the lands therein described; am thoroughly acquainted with them and have been for a great many years; I have been living on the property for about twenty years

7th question to the witness: "Since the purchase of the land by John Halsted, in what capacity have you lived on the lands?" Ans.: "Simply as an occupant for Halsted," and in answer to the 8th question the witness said: "My object in living on them was simply to take care of the property." In answer to the 9th question, witness said: "I live on what is known as the Huddleston tract, that is the front. I have had the lands inclosed and cultivated ever since I have lived there, and I have had three houses erected on it. These houses are in addition to those erected for the company in 1859. I erected six buildings for the company besides the one I live in. 10th question: Do you mean that the buildings and improvements were on that portion of the Huddleston tract purchased by the Forest Hill company from Grinnan and others above referred to? Answer: Yes.

In answer to the 11th question the witness says: I have occupied them constantly for more than twenty years.

In answer to the 12th question, whether or not the Forest Hill Company had any improvements on the Forest Hill tract, the witness said: Yes, there was some improvements; one on Tucker's hollow, another at the head of Tucker's hollow, and a third was made by a man by the name of Giles. They were occupied with my consent.

14th question: Examine the report and map I now hand you on which is printed "Report of the Forest Hill and Elk Ridge mining estates" marked "Ex. A," and state what you know about it, where it

come from and who made it. Answer: I recognize this map as one given me by either Smith or Grinnan. I think Grinnan gave it to me. Made by Prof. Saulisbury. It was given to me as a correct and reliable map of the property, and it was on the strength of that map principally that we bought the property. I afterward found that it was incorrect. It shows a union of the back and front tracts according to the terms of the deed, but we found afterwards that it was incorrect—not so, that they did not unite.

15th question: In your last answer do you mean the "Smith and Grinnan" who conveyed the land to the Forest Hill Company? Answer: Yes. The report and map was filed with the deposition marked "Ex. A."

In answer to the 16th question: The witness points out on said map the Forest Hill tract referred to in "Ex. B," (the deed from Smith and Grinnan) and describes it as represented, by the figures 1, 2, 3 and 4, on said map; and the Huddleston tract by the figures 5, 6, 7 and 8 on said map. 8th question: Which is the westerly side of the Huddleston tract as laid down on said map? Answer: That lying farthest down the river. 19th question: At the time the Forest Hill Company purchased the land, how many acres were supposed to be in the Huddleston tract? Answer: Two hundred. 20th queston: Did the Forest Hill Mining and Manufacturing Company ever authorize any one to so lay off its purchase of this part of the Huddleston tract, that would change in any way the location of its purchase from the calls of the deed from Smith and Grinnan, to the company? Answer: No.

Question 21: Did the Forest Hill company ever accept in any way a division of the Huddleston tract so as to change the boundary of that part purchased by it from the calls of the deed referred to? Answer: No. Question 22: What object did the Forest Hill company have in purchasing the westerly part of the Huddleston tract in connection with the Forest Hill tract of 2,000 acres? Answer: Simply as an entry to the back lands.

Question 23: Would the company have purchased the Forest Hill tract from Smith and Grinnan without purchasing at the same time that part of the Huddleston tract it did purchase? and if not why not? Answer: No, they would not have purchased it for the simple reason that without the Huddleston tract there is no outlet for the back tract. Question 24: What damage would it be to the Forest Hill tract to so lay off the Huddleston tract as to have a small strip of land running

between that portion of the land purchased by the Forest Hill company from the Forest Hill tract as belonging to that portion of the Huddleston tract retained by Smith and Grinnan? Answer: It would be very difficult to estimate the damage, but I would say it would destroy at least one-half the value of the back tract.

In answer to the 31st question the witness says: He misunderstood the 14th question, and corrects his answer to the question by saying that the Huddleston tract (that is the 200 acre tract) does join on the 2,000 acre, Forest Hill tract and that several courses of the two tracts are identical. 34th question: Who set over that portion of the Huddleston tract, as stated in your last answer, and what authority had they to do so? In answering the witness says: The survey was made and the lines were run by Robson; I was in New York when Grinnan had the lines run by Robson, and when I came back in 1859 I learned for the first time that the lines had been run and the division had been made. This survey was made and the lines run in 1859. In reference to the authority for running those lines and for making the division, a man from New York, by the name of McKenney, had been sent out here by Smith and Grinnan to oversee the survey and division, and of course I presume to act as their agent in the matter. The whole tract of 2,000 acres was surveyed about February, 1861. It was then for the first time that we knew or had any suspicion that the Huddleston frontage did not unite with the Forset Hill tract This occurred just at the beginning of the war in 1861.

35th question. In the survey or plat furnished you by Robson, at the instance of Grinnan, in 1859, was there anything to indicate on said map, or otherwise, that the land so laid off did not border on the Forest Hill tract, as called for by the deed of Smith and Grinnan to the Forest Hill Company? Answer: There was nothing.

36th question: Were any of the lines of the Forest Hill tract represented on said map? Answer: No, not a line.

37th question: Were any representations made by Smith and Grinnan, or either of them, or by the surveyor who made the survey in 1859, or by any one to the Forest Hill Company that the land laid off by Smith and Grinnan, as a part of the Huddleston tract to the Forest Hill Company, did not border on the Forest Hill tract of 2,000 acres? Answer: There was none. 41st question: What possession has A. G. Grinnan had to that portion of the Huddleston tract claimed by *him*, etc.?

Answer: I know of none. There has certainly been no occupancy of the place.

42nd question: Has the said land during the period referred to or any part thereof been fenced or improved? Answer: No. 43rd question: According to what boundaries have you held possession of the lands described in the deed from Smith and Grinnan to the Forest Hill company for the last twenty years? Answer: According to the calls of the deed. 44th question: How do you undertake to account for the action of A. G. Grinnan in laying off the Huddleston tract in 1859 so as to separate the Forest Hill Company's front land from its back land, &c? Answer: Grinnan has never offered any explanation to me. 46th question: If it had been reported to the Forest Hill company by Smith and Grinnan after they had completed the survey of the Huddleston tract in 1859, that it had been so divided that the company's front land was separated from its back land what would have been the answer of the company to him in regard to it at the time? Answer: It would have refused to accept the deed and compelled him to return the purchase money.

47th question: A. G. Grinnan says in his answer filed in this cause, that two of the members of the Forest Hill Company, namely, Hale and Eames, were present, with the surveyor when he made the survey of the Huddleston tract in 1859. State who said Grinnan refers to * * * when he speaks of Hale and Eames, and whether or not you were present when said survey was made, and if Eames was present. State what authority he had to bind the company in accepting a survey * * * in violation of the calls of the company's deed? Answer: By Hale, he refers to me. I was in New York. My mind is perfectly clear on that point owing to certain circumstances. The Eames refered to was Richard Eames. He was present. He was our machinist and not connected with the company in and other capacity. He did not have a shadow of authority either to change the lines as run or to accept or reject the survey. With this deposition is filed the *original* plat and notes of T. S. Robson, of the land surveyed by him for Smith and Grinnan in 1859, referred to by the witness and marked "Exhibit B," a copy of which will be seen in the record, page 134.

On cross-examination the witness says in answer to the 8th question, that the survey is dated October 14th, 1859. I returned from New York during the early days of December following. It (the plat,) was lying with other papers in the office. In answer to the 15th question

witness says: I am not very well acquainted with the division line. I have never been over that line—that is, the full length of it. The 16th question to the witness is as follows: Please show on "Exhibit B" with this deposition the lines of said 105 acres that you are most familiar with; and the witness says: I am most familiar with the *river* line, and the long line of 460 poles. Answer to the 17th question witness says. I have been a *short distance* on the 244 poles line, but never was on the 84 poles line, or the 126 poles line. 19th question to witness: Did I understand you to say the 105 acres was set apart to the company by Grinnan by virtue of arrangements made at the time of the purchase of these lands by the company? Answer: The agreement was that it should be laid off according to the calls

The agreement was that we were to have *one half* of the *frontage* and they were to have the survey made at their expense, and they agreed that the tract should be properly and fairly divided, and of course the union was to be made to the back land according to the deed In answer to the 22nd question the witness says: It is my impression that I mentioned the subject (the error in running the division line) to Grinnan in writing to him; it was a good many years ago. The 38th question is as follows: Can not the Forest Hill tract be conveniently reached and mined and shipped by way of Armstrong's Creek and Tucker's Hollow? and witness says: It could be, but not conveniently; and in answer to the 35th question witness says: The right of way secured by the deed over Elk Ridge tract was for the purpose of getting the coal to market from the extreme back land.

Witness says: About all I know about him—J. M. McKenney—is that he took the acknowledgment of the deed from Smith & Grinnan in 1859, (42 Q. & Answer.)

In answer to the 44 question, witness says: "The sale was negotiated with this man Cowan, who was acting for Smith & Grinnan"

50th question: When did you first see Smith & Grinnan and where did they live? Answer: I first saw them in New York. Both of them told me they lived in Virginia. The witness says in answer to the 1st question on page 132 that "the buildings were certainly near the bank of the river."

In the second deposition given by Charles F. Hale, commencing on page 161 of record, he says as follows: 3 questions: When did you first become acquainted with the Huddleston and Forest Hill tracts of land, &c. and what relation did you bear to the Forest Hill Co. Answer: In

June 1859. My connection with the company was that of president of the company. In answer to the 5th question witness says his election to the presidency "was about the 15th of June, 1859, or shortly after that." This was before the company commenced making any improvements (6th question and answer). 7th question: Do you recollect the time T. S. Robson attempted to lay off the Huddleston tract in 1859 &c. Answer: I have no recollection of the exact time as I was not there. In answer to 8th question witness says it was in the fall of 1859 somewhere between September 25th and December 1st. I have a very distinct recollection of it for the reason that about the middle of September of that year I was called to New York on account of the death of my wife, and for business reasons I was detained there two or three months. 9th question: Whose duty was it to lay off to the Forest Hill Co. &c, by actual survey, that part of the Huddleston tract purchased by it from Smith & Grinnan and who procured T. S Robson and paid him for laying off said land in 1859. Answer: Under the agreement of Smith & Grinnan with the Forest Hill Co., it was their duty to lay off this portion of the Huddleston tract. To the best of my information they paid him (T. S. Robson) for his services. Question 11: Were any members or representatives of the Forest Hill Co. with T. S. Robson when he laid off said land in 1859, after he left the river or bottom land adjoining the river, and ascended the mountain? Answer: Not to my knowledge. *There was certainly no one there who was authorized either to accept or reject the lines that he run.*

Question 12: At that time how far did the Forest Hill Co. interest itself as to where the dividing line between the two divisions of the Huddleston tract would run, and where was it that the said company erected its buildings and improvements? Answer: They paid little attention to the dividing lines, supposing it was all right &c. The buildings, improvements and machinery were erected on the northerly side of the tract.

Question 14: Did the company know in 1859, or have any reason to suppose that Robson had not laid off said land according to the calls of said deed? Answer: No, they had none. In fact, it was not until long afterwards, I think about 1864 or 1865, that I had any knowledge of it. Question 16: So far as you know, did he (Grinnan,) make any claim to the said strip of land before the same was sold by John W. Harris, commissioner, in the suit of Grinnan and Long? Answer: Not to my knowledge. Question 21: Did you have any knowledge that

any part of this land in controversy in this suit, which separates the company's lands, * * was involved in the suit of Grinnan against Long and others, before Wyant made his purchase in 1882 or 1883? Answer: No, I did not. Question 23: T. S. Robson says in substance, in his deposition given in this case, that both parties were present when he laid off the land in 1859. What have you to say to this? Answer: Mr. Robson is mistaken. I was not there. I was in New York. Question 25: A. G. Grinnan says in his deposition that Dr. Hale and J. McKinney, a nephew of Judge Cowan, was present with Robson when he laid off the land in 1859. What have you to say to this? Answer: I certainly was not here. As for McKenney I don't know. McKenney had no connection with the company except to draw up some legal papers, and he certainly had no authority to act for the company in any way. Question 26: How have you occupied the lands since John Halsted became the purchaser of them in 1864? Answer: I have lived there on the frontage of the Huddleston tract. And in answer to 27th question witness says: As occupant for "John Halsted." 28th question: How have you claimed to hold the entire lands? Answer: Merely as his agent 29th Question: I mean what boundaries? Answer: The boundaries that are called for by the deed. Question 30: Do you recollect a man occupying a small improvement on the southern part of the Huddleston tract, named Jarrett? Answer: I have marked the place on the map, as near as I can locate it from memory. It overlaps the Forest Hill line on one side and on the other a portion of the Huddleston tract that was deeded to the Forest Hill company. I remember the man Jarrett very well, who lived there and he paid me rent for years. Question 31: How many years? Answer: About twelve years. (Record, page 164, bottom)

On cross-examination the witness says, in answer to 5th question: "The map that was made in 1861 never came into my hands till many years afterwards. I believe it was in 1865 that I first saw it." In answer to 8th question witness says, exhibit "T. R. No. 2": With Robson s deposition is a copy of said map. To the best of my recollection it came into my possession about 1867. (Answer to 9th Question.)

Question propounded to Hale on re-examination in chief, page 168 of record. Please examine the map which you have been referred to, marked "T. S. R. No. 2" and state if T. S. Robson, surveyor, ever pointed out to you where he run the division line, from the Kanawha

river back to the foot of the hills; if so state where he pointed out this line, and what trees or monuments he referred to? Answer: "Yes, he did; as I was not there when he run the line I was uncertain where it was. Some time afterward he was present on the place and went with me and showed me where the line was located, telling me that as there were no large trees on the line itself, he had marked two trees that stood the nearest to it, one a pin oak and the other a poplar, and that the line run almost exactly between them." * *

Richard M. Eames, in his deposition, commencing on page 150, of the record, in substance, says he is a mining and mechanical engineer. That he was on the Forest Hill property in Fayette county, Virginia, in 1859, 1860, engaged in his profession with the Forest Hill company. That he went into said company's employ in July, 1859, that he was on the property when T. S. Robson undertook to lay off to the Forest Hill company the part of the Huddleston tract it had purchased from Smith & Grinnan in 1859, but he did not accompany said Robson in running the lines, and that he does not think his brother accompanied him. That Dr. Charles F. Hale was president of the company, but was in New York when Robson run the lines; that John Halsted was also in New York when said lines were run by Robson. That the first time he saw the map filed with the deposition of Charles F. Hale marked "Exhibit B," was some time in the fall of 1859 at Forest Hill in the office. See map in record on page 134—That he was not with Robson when the map was made or the lines were run. That there was no conversation with him about laying off the tract, that he does not remember to have seen the map filed with Robson's deposition marked "T. S. R. No. 1." That he remembers that Robson was there to show them the corners on the front land; that he saw no plat or anything; that the company took no interest in the division made by Robson except to see where the lines would run near the river, so as to know where to locate their buildings. That he recollects that Dr. Hale was called to New York about that time on account of the sickness of his family and was gone several weeks; his wife was sick and died. That he cannot see from the survey but the Huddleston tract could have been divided so as to connect the front with the back land; can see nothing to prevent it. That he has no recollection of any one being at Huddleston's house when the plat was made by Robson but his brother. That the improvements and buildings which the company made and built were all on the river front, south of the road. That his brother, so far as he knows

had no authority to act for the company in any manner in running said division lines by Robson. The whole deposition of John Halsted should be read, and it will be found in the record commencing on page 111. It is clear and positive.

That he became interested in the Forest Hill company after the conditions of the purchase of the property had been agreed upon about the month of June, 1859; that the company issued three series of bonds of $500 each for the payment of the property, and that he purchased from Smith & Grinnan all the first and second series of bonds, fifty-one in all, except three, that the Forest Hill company was in possession of the property from the month of July 1859, to the spring of 1861 when they were obliged to abandon it, and that they erected works for the purpose of manufacturing oil; that his first visit to Forest Hill was in the summer of 1860. The Huddleston tract was said to contain about two hundred acres, one-half of which was sold to the company for a frontage to the two thousand acre tract behind it, and to afford an outlet for its coal product, also to afford the necessary building space for the erection of its works and dwelling houses.

That he has held undisputed possession of the property conveyed to him by the trustees deed, as described by the calls in Forest Hill Company's deed, from Wm K. Smith and A. G. Grinnan until after the sale of what is known on Robson's map as the Elk Ridge front (the sale referred to is the sale to Wyant) and Dr Charles F. Hale has made his home there since 1864. His residence is located on the westerly half of what was formerly known as the Huddleston tract, fronting the Kanawha river, when the Forest Hill Company took possession in 1859.

That he was told that Robson ran the lines for the purpose of laying off the westerly half of the Huddleston tract so that they would know where to erect their buildings. That he knows a man by the name of Richard M Eames. Neither he or any one else had any authority to represent or bind the company in laying off the tract in a different manner from the calls specified in said deed.

The property is altogether mountainous and is chiefly valuable for its coal and timber. The part of the land that has been inclosed and under cultivation is the frontage occupied by Dr. Charles F. Hale.

That Grinnan has had no *possession whatever* of the land that Smith and he conveyed to said company, and Grinnan has had no tenant on the part of the Huddleston tract which he did not convey to said company, nor has it been inclosed. That he had no knowledge of the re-

maining part of the Huddleston tract being offered for sale, nor did he know that it had been sold until some time afterwards. That John F. Cowan was the agent through whom Smith and Grinnan sold their property to the Forest Hill Company. That John McKenney was not an agent of the company, but he was in every sense of the word the agent of Smith and Grinnan, "*sent by them to order such surveying as was necessary to complete their part of the contract, in order to give possession* of the property to the company," and "*he had no authority* from the company to give such directions to the surveyor, as to cause a failure of compliance with the calls of the deed." That he has no knowledge of the said plat being returned to the Forest Hill Company in New York. That Dr. Charles F. Hale was his tenant and held undisputed possession of the property covered by the calls of the deed.

That in 1878 or 1879 his attention was called to a notice in some newspaper, in which his name appeared, and he wrote to Grinnan asking what it meant, and Grinnan replied that it did not affect his interest in any way, but that it was a mere matter of form That he has no recollection of A. G. Grinnan expressing anything in word or deed adverse to his (Halsted's) interest regarding any portion of the land conveyed to him until 1883, when he wrote to him concerning the sale made to Wyant, and even then he did not claim ownership to justify the act of sale to Wyant. A. G. Grinnan has never made any claim to the strip of land now in controversy, to Halsted's knowledge, until Halsted wrote him in 1883, nor has he been in actual possession at any time. When Smith & Grinnan sold the property to the Forest Hill company, they used the Salesbury map to show how the Huddleston and Forest Hill tracts joined each other.

The deposition of John L. Cole shows that he is a practical surveyor, and has been on the front land of the western part of the Huddleston tract, and his attention is called to the deed from Smith and Grinnan to the Forest Hill company for the Forest Hill tract and the westerly part of the Huddleston tract, and he says that in his judgment there is no difficulty in laying off the Huddleston tract so as to connect with the back land. That he could only account for the way Robson laid off the Huddleston tract, that he knew nothing about "what the Smith and Grinnan deed had conveyed." Record, pages 159, 160.

The affidavits of John Halsted, A Burlew, R. M. Eames and Henry H. Eames, filed in support of Halsted's petition for a re hearing, prove that the map and report therein, pretended by Grinnan to have been

made by Robson of the Huddleston tract in 1859, and filed by him, (record, page 24,) are false in several particulars. That the said map is incorrect, as will be seen when compared with the original map made by Robson, (record, pages 204, 206,) and the interpolation of Armstrong creek, on said map, filed by said Grinnan, is wholly fictitious. That the words, "under the direction of J. M. McKenney, Dr. Hale and Mr. Eames" are also false and fraudulent representations, as will fully appear by the said affidavits of A. Burlew, on page 195; of John Halsted, on page 203; of Henry H. Eames, on page 205; and Richard M. Eames, on page 207, and by the original map and report filed with said affidavits, and by the deposition of Charles F. Hale in answer to 34th and 9th questions on pages 124 and 127 of record.

The defendants took the depositions of A. G. Grinnan, T. S. Robson, Wm. Wyant, A. G. Ansted, H. J. Tucker and John W. Harris. There is nothing in the depositions of Wyant, Anstead, Tucker or Harris, affecting the complainant's claim. They refer to the division line in the *bottom* near the *river*, about which there is no complaint. The deposition of T. S. Robson shows that he was the agent of A. G. Grinnan, and would like to be of service to him in this suit; but it shows also that he did not have any title papers before him concerning the Forest Hill tract of 2,000 acres, when he made the map and survey of the Huddleston tract in 1859. That the Huddleston tract was laid off without any reference to the Forest Hill tract. That whoever was at Forest Hill at the time, in the employ of the company, took no actual interest in the survey, further than to see where the division line would run through the bottom on the river, where the company was about to locate their buildings. That he recollects that John McKinney was there at the time and paid him for the work, and he was only able to give the name of one other man who was present, and his name was George Huddleston. See deposition of Robson commencing in record on page 140.

The deposition of A. G. Grinnan was taken without the presence of counsel for Halsted. It shows that Grinnan was not at Forest Hill at the time Robson made the division in 1859, but that he was in New York.

His attempt to fix the presence of Dr. C. F. Hale at Forest Hill at the time Robson made the survey in 1859, is utterly broken down by the testimony taken by the plaintiff, Halsted. He is broken down also in his effort to prove that John McKenney went to Forest Hill as the

agent of the Forest Hill company, to divide the Huddleston tract; and he is equally unsuccessful in his effort to prove that J. F. Cowan was the agent of the Forest Hill company in making sale of the lands to said company. And the positive way in which he undertakes to speak of matters, which his deposition shows, he could personally know nothing about, is a little surprising. His deposition will be found in the record commencing on page 136.

The copy of letter, he files with his answer, purporting to have been written by McKenney to him, is not in conflict with the statements of Halsted, Hale and Eames, that Hale was in New York at the time the survey was made. There is nothing in the record to show how long it was after McKenney reached Forest Hill, before Robson run the lines. It may have been several weeks and even months. Therefore, the presence of Hale when McKenney reached Forest Hill does not show his presence when the survey was made.

We submit that the evidence taken in this cause, so clearly preponderates in favor of the relief prayed for by the complainant that it satisfies the mind.

In looking at the record of the Lewisburg suits made an exhibit to the complainant's bill, we find our case much strengthened.

In Grinnan's statement to J. L. Marie in the fall of 1867, he says: W. K S. held a contract (assigned to him by W. H. Edwards) for 200 acres which Geo. P. Huddleston had made to convey same to Wm. H. E. This 200 were for a frontage for Elk Ridge tract to Kanawha, and one-half of this 200 was held by A. G. G. in fee. (Record, p. 296).

That in the bill filed by A. G. Grinnan against Long and others, he recites the substance of the bill filed by Chewning against Cowan and others, setting out certain conveyances, made by W. K. Smith to A.G. Grinnan, and among them "the remaining half of 200 acres of land," &c., "being the tract contracted to be conveyed to said Edwards for the benefit of said Smith by George Huddleston. (Record, 227).

And the bill prays the court to direct him in carrying out his trust.

The deed from W. K. Smith to A. G. Grinnan filed with the petition of Grinnan in said cause, in describing the lands conveyed, contains the words, "together with the undivided half of 200 acres lying between said 7,000 acres and Kanawha river. (Record, 272)

In the cases of Grinnan against Long, and Chewning and Cowan, Grinnan's interest in the Huddleston tract was proceeded against as an *undivided half*. The decree made therein in 1882 referring the causes

to Commissioner Harris, contains the following language: "And it appearing from the papers and proceedings that said Grinnan is entitled to *one undivided half* of the Huddleston tract." Record p. 85.

On the 10th of July, 1882 a further decree was made in said causes, directing Commissioner Harris "to sell certain lands, including *one undivided half* of the Huddleston tract." p. 42.

The commissioner made report that he had sold this land to Wyant, and a decree was made on the 27th of April, 1883, confirming said sale See decree commencing on page 43.

The decree recites that there were 154⅛ acres in said Huddleston tract, which the commissioner had sold, and also, 9 74–160 acres adjoining which the original owners claimed as a part of said tract, making the number of acres of the Huddleston tract which the commissioner had sold, 163 and a fraction.

The evidence in the case of John Halsted against A. G. Grinnan and others shows that it was the intention of all parties to the deed from Smith and Grinnan to the Forest Hill company to convey to that company an undivided half of the Huddleston tract.

The case made by Grinnan in his suit against Long and others, shows the same fact, and it shows also that the remaining part of the Huddleston tract was proceeded against as an *undivided half*.

The deed from Smith & Grinnan to the Forest Hill company sustains the complainant's contentions that the intention was to convey an *undivided half* of the Huddleston tract. There is an express warranty in said deed that each for *himself*, but not *jointly*, warrants the title to the property conveyed. There is a covenant, also, that the grantors have a good, absolute and indefeasable estate in fee simple, in the property conveyed. There is a covenant also, that the property is unincumbered. There is a covenant also, that the grantee shall have the right to "cause or procure to be made or done or executed, all and every such further and other lawful and reasonable acts, conveyances for the better and more efficient vesting and confirming of the land hereby intended to be conveyed."

But there is no express covenant in the deed that the land conveyed (Huddleston tract) contains any definite number of acres. The designation of the number of acres is in connection with, and is a part of the description of the land, conveyed. If on the execution of the deed the intention of the parties had been that a definite number of acres should be assured to the vendee, the proper way would have been to incorpo-

rate a covenant in the deed to that effect. It would have been as easy to do so as to covenant that it was free and unincumbered. No such covenant was made.

Brumbaugh vs. Chapman,

Supreme Court of Ohio 1887,

Reporter No. 24, 1887 page 762, volume 24.

The court in construing the deed from Smith and Grinnan to the Forest Hill Company, will look at the language employed and the surrounding circumstances, so as to view the circumstances as the parties viewed them.

Nash and Torone, 5 Wall, 689.

The deed from Robert Soulter, trustee, describes the part of the Huddleston tract therein conveyed, as one hundred acres more or less, to be surveyed off the western side of the Huddleston tract as the same was subsequently ascertained, but it is added "adjoining the above.". That is the part conveyed was to be laid off the western side of the Huddleston tract so as to join the Forest Hill tract of 2000 acres. The right of way over Elk Ridge tract is also secured by said deed, and then there is further added, "which said *lands* and *right of way* are more *fully described* in a deed from William K. Smith and A. G. Grinnan to said Forest Hill Mining and Manufacturing Company &c., together with all the *right title* and *interest* &c., which the said party as trustee, named in said deed, *ever had* in the lands and tenements &c. While the deed refers to a survey made subsequent to the deed from Smith and Grinnan it conveys every foot of land and every right, title and interest which had been conveyed to the trustee by said company, so that there should be a union between the front and the back lands, and the deed shows that in 1864 neither said trustees nor John Halsted knew that Robson had not laid off the Huddleston tract as required by the said deed from Smith and Grinnan.

The reference to the subsequent survey in this deed can not control the lands therein conveyed, and has no significance but to show that the parties were entirely ignorant of the conflict which exists between the survey made by Robson and the deed from Smith and Grinnan. See deed, commencing on page 13 of record; granting clause on page 15.

The effort made by the defendants to show that the purchase of the westerly half or part of the Huddleston tract, by the Forest Hill company, together with the 2,000-acre tract, from Smith & Grinnan, was not intended as an outlet for the 2,000 acres to the Kanawha river, is

disproved by the deeds and evidence in the case in the most conclusive manner. In 1867, before W. K. Smith purchased the Elk Ridge tract from W. H. Edwards, he compelled Edwards to enter into a "*contract*" with George Huddleston, for the benefit of Smith, for the purchase of the Huddleston tract for an outlet for the Elk Ridge tract to the Kanawha river. The maps filed in this cause show that the Elk Ridge tract does not come to the Kanawha river by nearly a mile. When the sale was made by Smith & Grinnan to the Forest Hill company the parties undertook to so divide the Huddleston tract so that each, the remaining part of Elk Ridge tract, and the Forest Hill tract, would be provided with an outlet to the Kanawha river. The evidence taken by the complainant is clear and conclusive on this point, and it is supported by Grinnan's own evidence in his suit of Grinnan vs. Long. The right of way reserved in the deed from Smith and Grinnan over the Elk Ridge tract, was simply an *additional* and *precautionary provision* for the benefit of that portion of the Forest Hill tract that lies farthest from the river. It provided no *outlet* to the Kanawha river, for after the use of the right of way over Elk Ridge, the Forest Hill company would still be as far from the river as before, for all the land lying on Armstrong creek, north of the Elk Ridge tract, was and is owned by private persons, and the right of way over their lands could not be enforced by private corporations or persons, for *private purposes*, and the railroad on Armstrong creek, which the defendants speak of is a *private* road, over which the owner of the Forest Hill tract has no right whatever.

The facts are that the *dip* of the coal in the Forest Hill tract is to the northwest, and that the coal can not be mined against the *dip*, without incurring so much expense as to make the mining of it unprofitable. The natural outlet for all that part of the Forest Hill tract lying northwest of Tucker's Hollow, to the river, on account of the *location* of the land and the *dip* of the coal, is through the Huddleston tract, secured in the deed from Smith and Grinnan to the Forest Hill company, and there is no other outlet to the Kanawha river.

Wyant claims that he should be protected in his purchase, under section 8 of chapter 132 of the Code. Halsted was made a defendant in the suit of Grinnan against Long and others by order of publication, and he appeared and filed his petition for a rehearing, as required by section 14 of chapter 124 of the Code of West Virginia, which reads as follows:

"Any unknown party, or other defendant who was not served with pro-

cess in this State, and did not appear in the case before the date of such judgment, decree or order, or the representative of such, may, within five years from that date, if he be not served with a copy of such judgment, decree or order, more than one year before the end of said five years, and if he was so served, then within one year from the time of such service, file his petition to have the proceedings re-heard in the manner and form provided by section twenty-five, of chapter one hundred and six of this code, and not otherwise; and all the provisions of that section are hereby made applicable to proceedings under this section."

Section 8 of chapter 132 of the code is as follows:

"If a sale of property be made under a decree or order of a court, and such sale be confirmed, though such sale be afterwards reversed or set aside, the title of the purchaser at such sale shall not be effected thereby; but there may be restitution of the proceeds of sale to those entitled."

Section 8 of chapter 132 referred to, was not intended to do away with the irregularities which courts of equity had required in proceedings to sudject to sale real property, where conflicting interest were involved; nor was it intended to lessen the care and diligence which were required of purchasers at such sales. And where such irregularities appear, or such negligence or want of care exists, courts of equity will interfere now as they did before the passage of said statute. The purchaser is bound to use reasonable diligence in looking to the title and to the competency of the seller.

Baldwin vs. Johnson.
1st N. J., E. R., page 442.

If the property is not in possession of the person through whom it is directed to be sold, but is in the possession of another, this is enough to put the purchaser on inquiry as to how he holds the property, and if he fails to do so, he can not claim to be a *bona fide purchaser without notice.*

Diehl vs. Page.
3rd N. J., E. R ., page 143.

His purchase must be free from the *taint* of *fraud*, and if he have knowledge of a prior *contract* or *deed* for the land which has not been the subject of adjudication in the suit, his purchase will be set aside.

He must examine the record of the case and he will be bound by any irregularities which it discloses, which are sufficient reasons why the decree of sale should not be made The rule of *caveat emptor* applies to a purchaser at a judicial sale.

10 West Virginia R. page 142.
Oster vs. Union T. Co., 96 U. S. 424.

An examination of the cases will show that this is the view that the court of appeals of West Virginia has taken of the statute referred to.

Sinnett vs. Charles Administrator, 4 W. Va. 600.
Capehart's Ex'r vs. Dewery 10 W. Va. 130.

In the case last referred to the court says: "If the record discloses sufficient reasons to show that the sale was improper, the decree or order of confirmation will be set aside."

In the case of Pack and Underwood 23 W. Va. 704, the court says a purchaser is bound to look to the record of the suit, and cannot shut his eyes and say he did not know what the record disclosed.

A purchaser at a sale made under an order of court becomes a party to the suit.

22 W. Va. R. 182.

Hault vs. Donahue, 21 W. Va. 300

Harring vs. Lee, W. Va. 664.

Wyant cannot hold any part of the land he purchased, which had previously been conveyed by Smith and Grinnan to the Forest Hill Company. Because he had constructive and actual notice of the conveyance.

2nd. Because he is not a *bona fide* purchaser without notice of Halsted's title.

3rd. Because he had actual and constructive notice of the conveyance of the land by the Forest Hill Company, to Robert Soulter, trustee.

4th. Because his purchase, so far as he claims land which had been conveyed to the Forest Hill Company, is in violation of the decree under which he made his purchase.

5th. Because in so far as he claims land which had been conveyed by Smith and Grinnan to said company, he is not an innocent purchaser and his purchase is *tainted* with *fraud*.

In a late case between John Halsted and the heirs of Wm. B. Buster, in ejectment, Halsted's lost title to that part of the "Forest Hill" tract represented on the map hereinbefore referred to, marked "T. R. S. No. 2" (pages 148 and 149,) between the lines on said map marked the "Wilson line," and the "line claimed by Wm. B. Buster," containing about "95 acres," but he has again purchased this land, so that he is again the owner of the whole lands conveyed by Smith and Grinnan to the Forest Hill Company

We say, therefore, there is error in the two decrees appealed from for the reasons:

(1) That the deed of Smith and Grinnan to the Forest Hill Company, and the Salesbury map, show that the westerly half, or part of the Huddleston tract was purchased as an outlet for the Forest Hill

tract to the Kanawha river, and that it is susceptible of being laid off so as to carry out the intentions of the parties.

(2) That the Forest Hill Company nor John Halsted never consented to a division of the Huddleston tract, in violation of said deed, or at variance with it in any way.

(4) That John Halsted has held possession of the Huddleston tract according to the calls of the said deed from Smith & Grinnan.

(4) That both Halsted and Grinnan have recognized and treated the purchase made by the Forest Hill Company from Smith and Grinnan, as a purchase of an undivided *half* of the Huddleston tract.

(5) That Halsted has been guilty of no *laches* in the matter which should close the door of equity against him.

Halsted has been in open and notorious possession of the property, claiming according to the exterior boundaries of the calls of the deed by which Smith & Grinnan conveyed the land to said company, and Wyant has purchased with knowledge of this fact, or sufficient knowledge to put him on inquiry, and the records of the case through which Wyant made his purchase, disclosed all that Halsted is now contending for. There will be no inequiety in granting to Halsted all he claims, because whatever change has taken place in regard to the property, Wyant was sufficiently warned before he made his purchase.

Buckman vs. Cary, 129 U. S. p. 387. 102 U.S. 548
Gallicher vs. Cadwell, 145 U. S. 368.

If Halsted or the Forest Hill Company has at any time been misled as to where the true division line should run, in separating the part of the Huddleston tract purchased by the Forest Hill Company on account of the lines run by Robson or from any cause, this will not estop him from claiming his rights when the mistake is discovered.

Schreader Mining Company vs. Packer, 129 U. S. R. p. 689.
William Hatfield vs. William Workman, 35 W. Va. 577

All of which is respectfully submitted,

JOHN HALSTED.
By A Burlew, *Sol.*

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SUPREME COURT OF THE UNITED STATES.

JOHN HALSTED, Appellant,

vs.

A. G. GRINNAN and others, Appellees.

Supplemental Brief for the Appellant, John Halsted.

By A. BURLEW, Sol.

MOSES W. DONNALLY, PRINTER, CHARLESTON, W. VA.

SUPREME COURT OF THE UNITED STATES.

JOHN HALSTED, Appellant,

vs.

A. G. GRINNAN and others, Appellees.

Supplemental Brief for the Appellant, John Halsted.

By A. BURLEW, Sol.

To the Honorable Judges of the Supreme Court of the United States:

This cause was commenced in the District Court of the United States for the District of West Virginia, having circuit court powers, on the 24th of January, 1885, for a partition of a tract of land known as the "Huddleston" tract.

STATEMENT OF THE CASE.

In 1853, W. H. Edwards conveyed to Wm. K. Smith, 7,000 acres of land, lying in Fayette county, then Virginia, now West Virginia, known as the "Elk Ridge" tract, which tract contained within its boundaries, what is since known as the Forest Hill tract of 2,000 acres.

On the 1st day of October, 1857, Wm. K. Smith conveyed to A. G.

Grinnan, one undivided half of the Forest Hill tract; also, one undivided half of the "Huddleston" tract, described as a tract of 200 acres. On the 29th of October, 1857, said Smith conveyed to said Grinnan the remaining half of the Forest Hill tract; also, the remaining half of the Huddleston tract. On the 15th of June, 1859, W. K. Smith and wife and A. G. Grinnan and wife and A. G. Grinnan, trustee, conveyed to the Forest Hill Mining and Manufacturing Company, by deed of general warranty, the Forest Hill tract of 2,000 acres; also, a "certain piece or parcel of a certain tract of land known as the Huddleston tract, to be surveyed off the western side of said tract by a line running from the northerly to the southerly side of said tract, to be bounded on the south by the tract hereinbefore conveyed, and on the north by the Great Kanawha River, and containing one hundred acres, more or less."

The part of the Huddleston tract intended to be conveyed by this deed, was the undivided one half, to be laid off as above described.

Previous to this conveyance A. G. Grinnan had entered into a "contract" with George Huddleston for the purchase of the Huddleston tract and in pursuance of this "contract," said Huddleston, on the 27th day of October, 1860, executed a deed of conveyance of said tract to A. G. Grinnan, in which deed he describes said tract as containing "200 acres more or less."

That in the deed from Smith and Grinnan to the Forest Hill Mining and Manufacturing company, the Huddleston tract calls for the northern boundary of the Forest Hill tract, so that the two tracts shall come together and be co-terminous at these points, and that this was the intention of all parties to said deed at the time it was made, so as to give an outlet to the Great Kanawha river for the Forest Hill tract.

On the day Smith and Grinnan made said conveyance to said company, said company conveyed the same lands, by the same metes and bounds, to Robert Soulter, trustee, to secure the payment of a large number of bonds and other indebtedness of said company. And on the 6th day of June, 1864, the said entire lands were sold by the said trustee, for the said bonds and indebtedness, and was purchased by John Halsted.

At the time said Smith and Grinnan made sale of the said lands to said company, they exhibited the same by a map purporting to have been made by Prof Salisbury, which they represented as cor-

rectly showing the true location of said lands, and their relation to each other, and the said deed from Smith and Grinnan to said company for said lands was made by them to conform to said map; and said deed and map were delivered by Smith and Grinnan to said company practically as one paper.

That it was the duty of Smith and Grinnan, under their agreement with said company, to lay off the Huddleston tract to the Forest Hill Mining and Manufacturing Company, according to their said deed, and they undertook to do so, and said company supposed they had done so, until it was discovered, several years after, that a serious mistake had been made by the surveyor whom they employed to lay off said land. That said company took no part in the laying off of said land, further than to see that the division line was run correctly from the Kanawha river, a short distance back through a narrow strip of bottom, where it was about to erect some buildings

That said company took possession of the whole lands conveyed to it by Smith and Grinnan, according to the calls of the said deed, until the war broke out i 186', when it was compelled to abandon them until they made sale of the same in 1864, since which time John Halsted has been in *continuous, undisturbed* possession of said lands by actually and openly occupying them, to the present time, claiming according to the calls of said deed from Smith and Grinnan to said company.

That as soon as it became known to said company, that said land had not been laid off according to said deed, it repudiated the part of the survey which disregarded the requirements of said deed, and in like manner John Halsted has repudiated said survey since he became informed of the said error.

That the map filed in the cause, marked "T. S. R. No. 2," shows how the said lands lie in fact, and the division of the Huddleston tract which Smith and Grinnan attempted to make in 1859. It shows also that the division line which Smith and Grinnan had run separates the Huddleston tract laid off to said company, from the Forest Hill tract, so that they do not join each other.

That so far as William Wyant has purchased land which Smith and Grinnan had conveyed to the Forest Hill company, he can not hold them, because such purchase was not authorized, by the decree under which he made his purchase, and because he purchased with

full knowledge of the said sale which had been made by Smith and Grinnan to said company, and his purchase is tainted with fraud.

On the 26th of May, 1888, this cause came on to be heard upon its merits when the court pronounced the following decree:

"These causes this day came on to be heard together and were argued by counsel: whereupon, upon consideration hereof, it is adjudged, ordered and decreed, that the bill and amended and supplemental bill, in the first above mentioned causes be, and the same is hereby dismissed and that the defendants therein recover of the complainant, John Halsted, their costs about their defense in that behalf expended. And it is further adjudged, ordered and decreed that the petition for rehearing filed in said second and third suits above mentioned, and the rule awarded said Halsted in said suits against the defendant, William Wyant, be each of them and the same are hereby dismissed: and it is further adjudged, ordered and decreed, that the defendants in said petition and said rule respectively recover their costs against said Halsted."

On the 27th of May, 1889, said court made one other decree as follows:

"These causes come on this day to be further heard upon the petition filed by John Halsted to rehear the decree entered in said causes on the 26th of May, 1888, and upon the affidavit of A. G. Grinnan and exhibits attached thereto, and the affidavit of John Halsted, R. M. Eames, Henry H. Eames and exhibits accompanying the same, now ordered to be filed.

And thereupon, upon consideration thereof, it is ordered, adjudged and decreed, that said motion be refused, and said petition to rehear said causes be dismissed, and that the defendants recover of the said Halsted, their costs about their defense of said motion expended."

From the foregoing decrees an appeal has been taken by John Halsted to the Supreme Court.

It was error to dismiss the complaintants bill, and amended and supplemental bill, and to decree costs against said Halsted. It was error also to dismiss the petition for rehearing and the rule awarded said Halsted in said decree of May 26, 1888. It was error also to dismiss the petition of John Halsted for a rehearing of the said decree of May 26, 1888.

QUESTIONS INVOLVED.

1.

Whether or not a court of equity has jurisdiction in cases for partition of land?

II.

Did W. K. Smith and A. G. Grinnan and others convey to the Forest Hill Mining and Manufacturing Company, the Forest Hill trict of 2,000 acres, and the western half of the Huddleston tract, to be laid off, as stated in complainants bills?

III.

Has the title which the Forest Hill Mining and Manufacturing Company, acquired by the deed from Smith and Grinnan, to the two tracts of land, set up in complainants bills, come down by proper conveyances to John Halsted?

IV.

Has John Halsted, in any way, deprived himself of the right to any part of the lands, conveyed to him by Robert Soulter, trustee?

In answer to the first of the foreging questions, I say, our statute provides that the circuit court shall have jurisdiction in cases of *partition*, and in the exercise of such jurisdiction, may take cognizance of *all questions of law, affecting the legal title*, that may arise in the proceedings.

Code ch. 79, sec. 1 p. 649

So that now courts of equity may decide upon the title as an incident to its jurisdiction to make partition.

Moore *vs.* Harper, 27 West Virginia, 368.

In answer to the second of said questions, it is admitted that Smith and Grinnan conveyed the Forest Hill tract, and the Huddleston tract as described in their deed to said company, dated the 15th of June, 1859. Record pages from 6 to 9.

But it is insisted by the defendants, that Smith and Grinnan, did not convey the westerly *half* of the Huddleston tract by said deed, but that they conveyed *one hundred acres more or less*, to be surveyed off the western side of said tract, &c.

To reach a proper decision of this question, I call the attention of the Court to the deed from W. K. Smith to A. G. Grinnan, dated in 1857, by which the grantor conveyed *one undivided half* of the Huddleston tract described as containing 200 acres. "C. C." Record 272. Also, to the deed conveyed by said Smith to said Grinnan, dated 29th October, 1857, by which deed said Smith conveyed *the remaining half* of the *200 acre tract* (Huddleston's tract) Record, 10.

Also, to the deed from George Huddleston to A. G. Grinnan, dated 27th October, 1860, for the Huddleston tract, described as "containing 200 acres, more or less," made in accordance with the previous "contract" referred to. Record, pp. 5 and 6.

These conveyances, considered in connection with the *covenants* in the *deed* from Smith and Grinnan to the Forest Hill company, make it clear that it was the intention of Smith and Grinnan, by their deed to said company, to convey *one-half* of the Huddleston tract. There are a number of *express covenants* in said deed, but none that the land conveyed (Huddleston tract) contained any definite number of acres.

The *designation* of the *number of acres* is a part of the *description* of the land conveyed

Brumbaugh *v.* Chapman, Supreme Court of Ohio.

Report No. 24, 1887, p. 762, Vol. 24.

The Court in construing the deed will look at the language employed and the *surrounding circumstances.*

Nash *v.* Tarone, 5 Wall. 689.

The Court will observe, that *Grinnan* in his *bill* against Long and others, treats the part of the Huddleston tract retained by *him* as an *undivided half*, and the decree which he procured in said cause recites, that "it appears from the *papers and proceedings* that said Grinnan is entitled to *an undivided half* of the Huddleston tract." Record, 85.

The words "*more or less*," in said deed, were intended to limit said company to one half of the number of acres in the tract, should there have been less than 200 acres therein, and to give it one-half the whole number of acres, should there be *more* than 200 acres therein, and unless this construction be given, the words "more or less" have no meaning,

But the laying off the Huddleston tract according to the requirements of said deed from Smith and Grinnan to said company, is not effected by the quantity of land conveyed by said deed.

In answer to the 3rd of said questions, I say it is not denied, that on the day Smith and Grinnan conveyed the said lands to said company, *to-wit*, on the 15th of June, 1859, said company conveyed the same lands to Robert Soulter, trustee.

See copy of said deed. Record, 13.

This conveyance was made on the 15th of June, 1859, and the

division line was attempted to be run by Robson, surveyor, under the direction of Grinnan, on the 14th of October, 1859, four months after the lands had been conveyed to said trustee. Record, 134.

By the deed from Robert Soulter, trustee, to John Halsted, "all the *right, title* and *interest*," which the trustee "*ever had in the lands and tenements*," by virtue of the deed from the Forest Hill Company to him, were conveyed to said Halsted, and by it the Huddleston tract is called to be laid off, "*adjoining the above*," meaning the Forest Hill tract of 2,000 acres. See deed in Record, pages 11, 12. So that there can be no successful contradiction, that all the lands conveyed by Smith and Grinnan to the Forest Hill Company, without change, have by proper conveyances, come down to John Halsted.

In answer to the fourth of said questions involved:

John Halsted purchased the two tracts of land in 1864, and took possession of them and has been in undisputed possession of them from that time to the time of bringing his suit for partition. That Dr. Charles F. Hale, the tenant of Halsted, has made his home there since 1864. His residence is located on the westerly half of the Huddleston tract, fronting the Kanawha River, where the Forest Hill Company took possession in 1859.

See Halsted's answer to the seventh interrogatory. Record, page 113; and to the twentieth interrogatory, page 115.

Grinnan never made any claim to the land involved in this suit until 1883. Record, 117.

Dr. C. F. Hale says he has lived on the property for about 20 years, as occupant for Halsted, and is thoroughly acquainted with them. Answers to 6th and 7th questions, p. 120. That his object in living on the lands was simply to take care of the property. Answer to 8th question. That he lives on what is known as the Huddleston tract—"that is, the *front*." That he has had the land inclosed and cultivated ever since he has lived there, and has had three houses erected on it. These three houses are in addition to those he erected for the company in 1859. That he erected six buildings for the company, besides the house he lives in. Answer to 9th question, p. 120. These buildings and improvements are on that portion of the Huddleston tract purchased by the Forest Hill Company from Smith and Grinnan. 10 Q. and Answer. That he has occupied these lands constantly for more than 20 years. Answer to 11th question. That the Forest Hill Company had improvements,

inclosed and occupied on the Forest Hill tract of 2,000 acres Answer to 12th question, p. 120. That the part of the Huddleston tract claimed by Grinnan had not been occupied. Answer to 41st question, p. 125 It has not been improved or fenced. Answer to 42d question. That he, Dr. C. F. Hale, has held possession of the lands conveyed by Smith and Grinnan to the Forest Hill Company, according to the *calls of the deed*. Answer to 43d question, p. 125-6. That Grinnan never made any claim to the strip of land in controversy before the sale of it by Commissioner Harris. Answer to 16 question, p. 162.

That the improvement occupied by "Jarrett was partly on land owned by Wm. Buster, and ran over the line on the part of the Huddleston tract deeded to the Forest Hill company by Smith and Grinnan. That he remembers Jarrett very well, and he paid Dr. Hale rent for years – twelve years he would say––(answer to 30 and 31 questions, p. 164) in produce and fruit to the amount of about ten dollars a year. (Ans. 13 q , p 166). The first year or two that Jarrett was on the land he was told that he was on Bill Buster's land and paid him rent, but after that Hale satisfied him that he was on Halsted's land, and Jarrett paid him the rent afterwards." P. 166 in answer to 14 Q That the clearing occupied by Jarrett lapped over on both sides, partly on the Forest Hill tract proper, and partly on the Forest Hill portion of the Huddleston tract. (Ans. to 19 Q. p. 166.)

That C. F. Hale, the president of the company, was in New York at the time Robson ran the dividing lines.

Answer to 7th and 8th questions, 161. And there was no one there who was authorized either to accept or reject the lines that Robson ran. 162. That "the agreement was that it (Huddleston tract) should be laid off according to the calls. That we were to have one-half of the frontage and they were to have the survey made at their own expense, and they agreed that the tract should be properly and fairly divided, and of course the *union* was to be made to the back land according to the deed." Ans. to question 19, page 128.

Richard M. Eames, an employee of the company, says he wanted the lines run so as to know where to locate their buildings, 154, and that Dr. C. F. Hale was in New York at the time the line was run by Robson. Answers to 40, 41, 42 questions, 154. That Eames

did not accompany the surveyor in running the lines, except to see where the lines ran through the *bottom next the river*, where the company was about to erect its buildings. 151. That Robson was there to show them the corners on the front land. (Answer to 21st question, 152, and that there was no conversation with him in regard to laying off the tract. (Answer to question 19, 152).

This is the substance of the evidence on the question of possession, and it shows that it was the duty of Smith and Grinnan to lay off to the Forest Hill Company the part of the Huddleston tract purchased by it, and that they undertook to lay off the land.

That Halsted and Hale, the president of the company, were in New York at the time, and that the two Eames' who were at Forest Hill in the employ of the company had no authority either to accept or reject the lines which Robson ran, and that they did not in fact accompany the surveyor in running the lines, except to see where they ran from the river a short distance back. That the improvements made by the company were in the bottom near the river. That the company stopped work in 1861. That Halsted took possession of the property in 1864 and has been in continuous occupancy of it since by *actual residence* thereon, *inclosed*, and *cultivated, claiming* and *holding* according to the *calls* of the *deed* from Smith and Grinnan to said company; that Grinnan has had no *actual* possession of the land claimed by him, and set up no claim to the land in controversy, until about the time this suit was brought; that the possession he endeavored to establish through one Jarrett, failed, as the evidence shows that Jarrett was the tenant of Halsted and paid Dr. Hale rent for the place he occupied for many years—twelve years or more.

The evidence is clear and undisputed—so far as the evidence goes—that the part of the Huddleston tract conveyed by Smith and Grinnan to said company, was purchased by said company for the purpose of an out-let for the 2,000 acre tract to the Kanawha river.

The map of the lands, made by Prof. Salisbury, which Smith and Grinnan exhibited at the time they made their sale to the Forest Hill Company, shows how they represented the lands to lie.

See map in record between pages 134 and 135.

Robson, the surveyor employed by Grinnan, says, he knew nothing of the deed from Smith and Grinnan, to the Forest Hill Company, all that he was requested to do was to lay off the line on

the *river front equally* between the Forest Hill and Elk Ridge, extending to the back line of the Huddleston survey, so as to contain one hundred acres. Answer to question 24, p 146.

The Huddlston tract had been conveyed and treated by all parties, until the survey was made in 1861, as a tract containing two hundred acres, and Robson had been required by Grinnan to lay off to the Forest Hill Company, one hundred acres, beginning on the river as stated above.

It is very clear, that Grinnan, after he ascertained that Robinson had not laid off the Huddleston tract, as required by his deed to the Forst Hill Company, did not regard, or treat, the lines run by Robson in violation of said deed, as a compliance with his requirements to lay off the land under his agreement with the Forest Hill Company, or as binding on any one, for he never set up any claim to any part of the land which had been conveyed to said company, until about the time Halsted brought his suit for partition, and in Grinnan's suit against Long and others—removed from the circuit court of Greenbrier county and made a part of this suit—he treats the part of the Huddleston tract retained by Smith and him, as an *undivided half*, and the decree which he procured in said cause, is for a sale of *one undivided half* of the tract called in the proceedings in these causes, "the Huddleston tract,' Record 84-5, 42, 33.

I have endeavered to show in my original brief, that neither Grinnan nor Wm. Wyant, can impose any successful defense to the suit of Halsted, on account of the sale made to Wyant through the suits in the circuit court of Greenbrier county, and I shall say nothing more on that point in this brief.

1st. I say therefore, that under the agreement between Smith and Grinnan with the Forest Hill Company, the responsibility of laying off the Huddleston tract, as required by the deed from the former to the latter devolved upon Smith and Grinnan, and it is because they have not discharged their duty in that respect, that the complainant has been compelled to bring his suit for a partition of a part of the land conveyed in said deed.

The complainant can not be charged with *laches* in applying to a court of equity to have done that which Smith and Grinnan should have done without a suit.

Gunton *vs.* Carroll, 101 U. S., 426, 429. Smith and Grinnan are the only parties to this suit to which the question of *laches* applies.

2nd. Neither the Forest Hill Company, nor John Halsted, ever consented to or acquiesced in a division of the Huddleston tract, different from what the deed from Smith and Grinnan calls for; and John Halsted has been in open and continuous occupancy of the land since 1864, claiming and holding according to the calls of the said deed from Smith and Grinnan; and Smith and Grinnan have had no *actual* possession of the Huddleston tract. Under such a state of facts, the statute of limitations could not be set in *motion* to defeat the complainant's right to apply to a court of equity at any time for a partition of the property according to the terms of the said deed; much less, could the defendants successfully plead *laches* on the part of the complainant to defeat his bill.

3rd. The effort on the part of Smith and Grinnan to show that they have had possession of the Huddleston tract lying east of the line run by Robson in 1859, through a tenant by the name of "Jarrett," has failed. The first one or two years that Jarrett occupied the "clearing," he recognized Wm. Buster as his landlord, but after that time, being convinced by Hale, the tenant of Halsted, that his clearing and improvements were on Halsted's land and in part on the Huddleston tract; he recognized Halsted as his landlord, and paid Hale, his tenant, rent for some 12 years, and there is no evidence whatever in the cause, that Jarrett ever surrendered his possession to Halsted, or did anything equivalent to a surrender. Jarrett therefore is estopped from denying or assailing, directly or indirectly, the title of his landlord, Halsted, and what Jarrett can not do, Smith and Grinnan can not do.

Lucas *vs.* Brooks, 18 Wall. 436.

Scott *vs* Rutherford, 92 U. S. 107.

4th. A clandestine entry or possession on the part of Smith and Grinnan, by a *secret* understanding with Halsted's tenant, to recognize them as his landlord, will not set the statute of limitations in motion, because Halsted can not be said to have acquiesced in the wrongful entry or possession. A *secret* possession will not do.

Newal on Ejectment, pp. 707–730.

5th. Halsted is the rightful owner of all the land conveyed by Smith and Grinnan to the Forest Hill Company, and was in legal possession and seizen of the whole. If Grinnan, therefore, obtained possession of any part of the lands he had conveyed to said com-

pany, with Halsted also in possession, the possession under such circumstances would be mixed, and the legal possession would be in Halsted, the rightful owner, and the statute of limitations was not set in motion.

Deputron *vs.* Young, 134 U. S., 241.

Newal on Ejectment, 431.

6th. In regard to the question of possession, Wyant occupies no better position than Smith and Grinnan. He purchased with full knowledge of the title and possession of Halsted to the land in controversy—and at the time this suit was brought, he had no possession of any part of the Huddleston tract, and even the character of his claim was not known to Halsted This suit was brought January 24, 1885, and Wyant claims to have purchased the land in controversy at public sale, on the 12th of April, 1883. If Wyant had taken possession of the land at the time he made his purchase, so as to set the statute of limitations in motion, it would only have run the period of 1 year, 9 months and 12 days when this suit was instituted.

And Wyant having purchased, with knowledge of Halsted's title and possession, can not defend this suit on the ground of *laches* for a time less than the statute of limitations, if it had been the duty of *Halsted* to have the land partitioned. Connecticut Gen. L., Ins. Co. vs. Eldridge, 102 U. S., 545.

The questions of knowledge, on the part of Wyant, of Halsted's title and his inability to hold any part of the land, which properly passed from Smith and Grinnan to the Forest Hill Company, under their deed aforesaid, are presented with considerable fullness in my original brief filed in this cause, and for that reason I confine myself here to a mere statement of those questions.

If Halsted has been misled as to where the true division line between the part of the Huddleston tract purchased from Smith and Grinnan and the part retained by them should run, this will not estop him from claiming his rights when the mistake is discovered.

Schreader Mining Company *vs.* Packer, 129 U. S. 689.

Hatfield *vs.* Workman, 35 W. Va. 578.

The map I herewith file, marked "No. 1," is a *fac simile* extract

1859 when he ran the partition lines of the Middlestrand tract.

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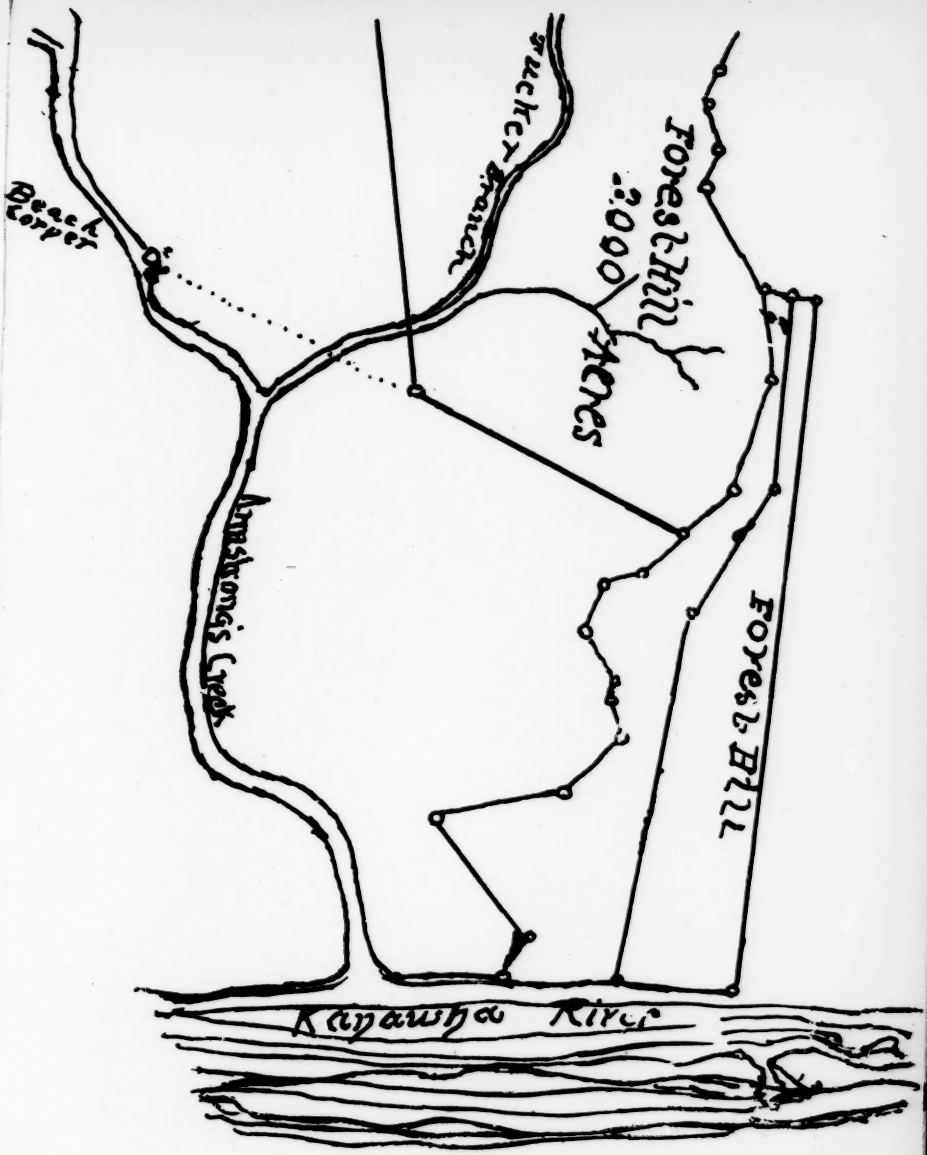
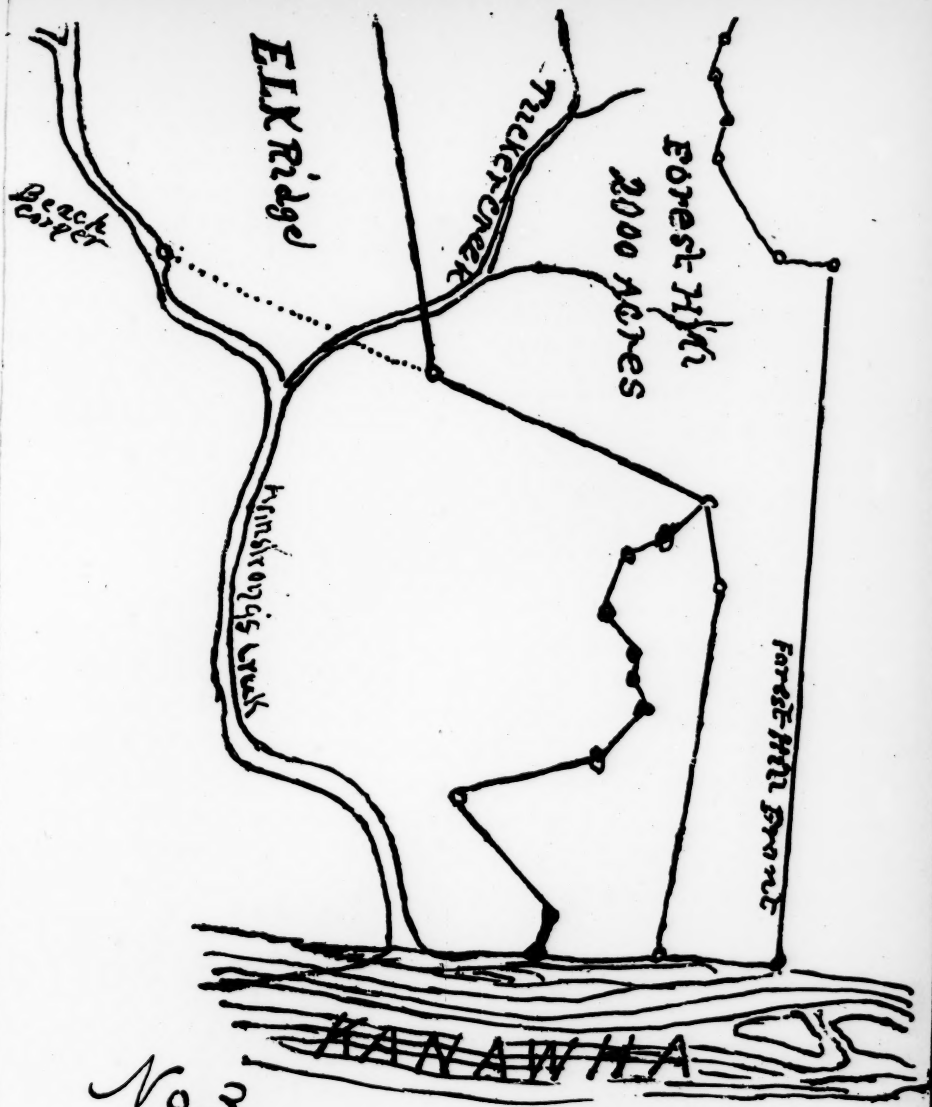
The map I herewith file, marked "No. 1," is a *fac simile* extract

Extract from Salisbury's Map 1858 showing the connection of the Huddleston and Forest Hill Tracts as called for by the deed of conveyance to the Forest Hill Company in 1859.



No. 2.

Extract from map marked "T.S.R. No. 2" showing that the surveyor did not comply with the calls of the deed of 1859 when he ran the partition lines of the Huddleston tract.



No. 3.

The Huddleston tract shows by actual survey $\frac{105}{154}$ total 259 acres and this map shows how a fair and equal division would meet the requirements of the deed to the Forest Hill Company and give them such an outlet to the River as was intended and so understood by the sellers and buyers of the property in 1859.

taken from the map made by Prof. Salisbury, hereinbefore referred to, and presented by Smith and Grinnan to the Forest Hill Company at the time they made their sale to said company.

The map I herewith file, marked "No. 2," is also a *fac simile* extract taken from the map made by Robson in 1861 hereinbefore referred to.

And the map I herewith file, marked "No. 3," is a map showing how the Huddleston tract may be partitioned, so as to substantially carry out the requirements of the said deed from Smith and Grinnan and give to them all the lands they did not convey to the Forest Hill Company, and one-half the Huddleston tract, or more, as the court may direct.

The division line made by Robson in 1859 from the Kanawha river through the bottom land, where the Forest Hill Company located its buildings, is correctly run, and is after the line leaves the bottom land that it diverges from the true course, more and more, as will appear by the map of said lands made by Robson in 1861, marked "T. S. R. No. 2 –" (149.)

All of which is respectfully submmitted.

JOHN HALSTED.
By A. Burlew, Sol.

Possession is notice to all of the possessors rights and he need assert them only when he finds occasion to do so - 129. U.S. 389. 390

Laches does not grow out of the passage of time.
145 - U.S. 368.

28

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IN THE

Supreme Court

OF THE

UNITED STATES.

JOHN HALSTEAD, *Appellant*,

vs.

A. G. GRINNAN, *et als.*, *Appellees.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

BRIEF OF COUNSEL FOR A. G. GRINNAN, APPELLEE.

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

BRIEF OF COUNSEL FOR A. G. GRINNAN, APPELLEE.

On the 15th day of June, 1859, Wm. K. Smith, Andrew G. Grinnan and their wives first conveyed to the Forest Hill Mining and Manufacturing Company, a corporation, 2,000 acres of land situated in Fayette county, then Virginia, now West Virginia; secondly conveyed an interest in a certain tract so situated, known as the Huddleston tract. That part of the deed in reference to the said Huddleston tract is as follows: "Also a certain piece or

parcel of a certain tract of land known as the Huddleston tract to be surveyed off of the western side of said tract by a line running from the northerly to the southerly side of said tract to be bounded on the south by the tract hereinbefore conveyed and on the north by the Great Kanawha River, and containing one hundred acres, more or less."

On the same day the said company conveyed said lands to Robert Souter, trustee, to secure certain debts of the company, and provided for a sale of said lands by said trustee in the event that the said company did not pay the debts thereby secured.

The said trustee on the 6th day of May, 1864, sold the said lands under the provisions of said trust deed to the complainant below and the appellant here, and by deed of date the 6th day of June, 1864, said trustee conveyed the said lands to the said Halstead. Page 13.

The bill in this cause was filed on the 24th day of January, 1885, by the said Halstead against A. G. Grinnan, the unknown heirs of the said Wm. K. Smith, the said company, the said Wm. Wyant, ~~trustee,~~ and others, and alleged in substance that the line cutting off from the Huddleston tract the portion which was conveyed by the said Grinnan and Smith to the said company, had in fact never been completely run and located, but admitted that some action had been taken in respect to its location in part, and the object and purpose of said suit was to have such portion set off to the complainant Halstead, located and defined according to the provisions of the deed.

The defendant, Grinnan, answered the bill and averred that under the contract contained in the deed as hereinbefore set forth, the said company was entitled only to one hundred acres of said Huddleston tract to be taken off of the western side thereof, and that the same had been located and surveyed by Thos. S. Robson, a surveyor, in the year 1859, at the instance and by the approval of the parties interested, and that the company had taken possession of their part so laid off in the year 1859, built houses on it and held it from that time by its lines separate and distinct from the other part of the said Huddleston tract, and that he never heard of any complaint of the manner in which it had so been laid off until about the time of the institution of this suit, and that he had held undisturbed possession of the residue of the said Hud-

dleston tract for much more than twenty years, and the plaintiff was barred by limitation.

The defendant, Wyant, answered the bill and averred that he had in the year 1883 become the purchaser under decree of court of the residue of the said Huddleston tract and that the portion to which the said company was entitled had been located and run off in the year 1859, and that the said company and those holding under it had taken possession of the part so laid off to them and had held the same ever since, and that he ascertained these facts before he became the purchaser of the residue of said tract.

Complainant filed an amended bill and the defendants answered the same, which in our opinion in nowise changed the merits of this cause as presented by the original bill and answers.

The proofs and exhibits show beyond controversy or question that in the year 1859 one hundred acres was laid off of the western part of the said tract, a plat made of such part, and the lines dividing it from the residue of said tract run, marked and defined upon the ground by boundaries and abuttals, and that the Forest Hill Company took possession immediately of a portion of the part so laid off to it, built houses, oil works, &c., upon it and fenced it in part up to the said division line and so held and claimed such portion upon which they had so built and in part fenced, as their exclusive property.

The appellant, Halstead, avers:

First—That it was not located as the deed provided.

Second—That it had not been so located by the approval and consent of the said company and himself, and that such location had not been acquisced in by said company and himself so as to bind them, and

Third—That the portion so located, surveyed and bounded did not give to him or the company the full portion of the tract to which they were entitled.

It will be observed that the provisions of the deed aforesaid from Grinnan and Smith to the company provided that in substance and effect that the company was to have a certain piece or parcel of the Huddleston tract, and that said piece or parcel was to be surveyed off of the western side of said tract by a line running from the northerly side, which is the side bordering on the Kanawha river, to the southerly side of said tract, which is the end or side furthest from the Kanawha river, and bounded on the

said south side by the said 2,000 acres and on the north by the Great Kanawha River, and such parcel was to contain 100 acres more or less.

It appears from the exhibits filed in the cause that it had been supposed before the sale to the company, that the said Huddleston tract was situated in part immediately in front and north of the 2,000 acres, and in the deed of Smith to Grinnan, on page 272 of the record, dated on the 1st day of October, 1857, it is so stated, and it was doubtless owing to this supposition that it was stated in the said deed from Smith and Grinnah to the said company, that the parcel to be laid off to the company from the Huddleston tract was to be bounded on the south by the first tract mentioned in said deed, to-wit: the said 2,000 acres, but as a matter of fact no part of the said 2,000 acres touched or bounded the said Huddleston tract on the south side, but said 2,000 acre tract was wholly east of said Huddleston tract and only bordered for a short distance on the east side of said Huddleston tract. The deed was specific that the division of the Huddleston tract was to be made by a line running from the northerly to the southerly side of said tract and that the company was to have the portion of said tract west of said line. The location of the said two tracts of land on the ground rendered it utterly impossible for the parcel to be so laid off to the company to be bounded on the south by the said 2,000 acres. Therefore, the descriptive call of said deed stating that the parcel to be laid off to said company was to be bounded on the south by the other tract necessarily had to be ignored and the pleadings of the complainant admit this fact and pray that said tract shall be so partitioned that the company's part of said tract ~~shall~~ that be so laid off that it shall be bounded on the east by the said 2,000-acre tract. This would change the whole provisions of the deed. The division line would then instead of running from the northerly to the southerly side of said tract run from the northerly to some point on the easterly line of said tract and no part of the remaining portion of said tract would reach the southerly side. This would be in effect making a new contract for the partition different from the one stated in the deed. It appears from the evidence that in 1859, soon after the date of said deed and about twenty-five years before the filing of the bill, that Thomas S. Robson, the surveyor of lands of the county in which said lands were situated, surveyed, laid off ~~and~~

[redacted] of the western side of said tract by lines running from the northerly to the southerly side of said tract as provided in the deed, the company's part thereof, and made a plat showing such division, and also made up the calls showing such division lines, and that the company immediately took possession of the part so laid off to them and built houses and factories, etc., thereon and took exclusive possession thereof and held and occupied it from said time until the institution of this suit and fenced a part of it according to said lines, and that Grinnan took possession of the residue of said tract and held the same through his tenant, Jarrett, and that said residue was afterwards sold and purchased by the defendant, Wyant. It also appears that in 1861, about twenty-four years before the institution of this suit, the company employed the said Robson to survey all of said lands, which he did under the direction of H. and R. Eames, the agents of the company, and made a plat for said company on which was shown specifically the location of the part of the Huddleston tract which had been previously so laid off to said company, and that said plat passed into the possession of said company, and from which it appeared that no part of the portion so laid off touched the other tract on the south side or at all. (See deposition of Thomas S. Robson, page 140; plat, page 149.)

The complainant in this cause is estopped from assailing the said partition as the conveyance to him by the Trustee Soutter is a conveyance not of a part of said tract thereafter to be laid off according to the provisions of the Smith and Grinnan deed, but is a conveyance of such part as then already had been laid off and partitioned as appears fully from the granting part of said deed of Soutter, Trustee to him, which is as follows: "also a lot, piece or parcel of land (containing 100 hundred acres more or less, provided in said deed to be surveyed off the west side of the tract of land known as the Huddleston tract, as the same was ascertained and bounded by the survey made subsequently to the execution of said deed and in pursuance thereof," page 15.)

The complainant, Halstead, accepted this deed, had it recorded, it is his sole title to said land, and has held the tract so surveyed off by said Robson and conveyed to him as aforesaid according to its boundaries and abuttals all the time knowing the manner in which it had been so laid off.

And we find Halstead in 1880, according to his own statement, in negotiation with Grinnan in respect to an offer of Grinnan to buy the adjoining tract and specifically offering him (Grinnan) a sum of money for the identical part of the said adjoining tract which he now seeks to have set off to him in this suit. Halstead's answer to the 23rd interrogatory, page 116 in part is as follows: "For several years A. G. Grinnan had been urging me to buy his adjoining tract, and I told him I had already too much unproductive property on hand, but in the year 1880 I wrote him to this effect: That I would like to make the connection between the front and back land more complete, so that it would show to better advantage on the map, and that I would give him one hundred dollars for so much of the land as he owned running back from about where the Wilons line crosses the track." The adjoining land above mentioned is the upper part of the Huddleston tract and that part thereof which was left after the company's part was surveyed off, and is marked on the map, page 149 "Elk Ridge Tract" and the part of it which Halstead was trying to purchase and which he above says was owned by Grinnan is that part situated south of the line on the map marked "Wilson's North Line" from the black letter "B" to the figure "4."

On the 1st of April, 1882, Halstead again wrote Grinnan in regard to the purchase of this adjoining tract of land, page 139, in which letter he says * * * *

"In regard to the purchase of the property referred to in your letter, I have no idea of purchasing at the price you have hitherto asked for it. Its value in my estimation has not increased since my correspondence with you on the subject a few years ago, and if I was situated as you are in regard to that property I would have sold it long ago for the best offer I could get. Our ideas of value in that direction are so wide apart that I don't —how it is possible for you and I to come to terms on that question." Thus it appears that Halstead was admitting that this adjoining piece of land was the property of Grinnan, that he knew its exact location, that it was situated in part between the part of the said Huddleston tract which had been laid off, to the company, was trying to purchase such part so as to conncect his said two tracts, and not being able to arrive upon terms was advising him to sell it to others and now after all that, claims that it was really in part undivided land and that he owned a part of it.

Halstead now attempts to get away from the partition upon the ground that it was not so made by the consent of the company, and not approved by them. Dr. Charles F. Hale was the president of the company in 1859, and two gentlemen by the name of Eames were connected with it, and in its employ.

Mr. Robson, the surveyor, in reply to questions as to the division, testified as follows:

"Ques. 4. Did you assist in laying off that portion of the Huddleston tract granted by the said Grinnan to the said company, and if so when and at whose instance?

"Ans. I did assist about the year 1859 or '60, in laying off said land. Both parties were represented, and I did it at the instance of both parties or their representatives. I think both parties agreed to it.

"Ques. 6. Under what instructions from the parties as such surveyor did you proceed to lay off that portion of the Huddleston tract granted by the said Grinnan to the said company?

"Ans. I was required to lay off one hundred acres, to the company to be on the west side of said Huddleston tract, together with about five acres of a tract lying fronting the Huddleston tract of (32½) thirty two and one half acres, known as the L. H. Brannon survey. I was also required to divide the front line on the river equally between the Forest Hill and Elk Ridge tracts, giving each 70 poles, and before going to the field I platted both the Huddleston and Brannon surveys on paper and drew the division lines between the Forest Hill and Elk Ridge tracts so as to cut off one hundred acres of the Huddleston tract and about five acres off the Brannon tract, making an addition of one hundred and five acres to the Forest Hill tract. This I had to do on paper in order to get the courses and distances of the division lines."

He further says: Ans. 7—"All parties present interested must have seen and agreed to it or I should not have run the said division lines." And he files with said deposition the original plat so made by him which is found on page 148.

He further testifies that he cannot now recollect exactly who the parties were, but is satisfied that both parties were represented on that occasion. That he afterwards re-ran all of the said company's lands as aforesaid, and subsequently became the agent of Grinnan in respect to the residue of said tract of land left to him, and that he never heard any complaint from any of them in re-

spect to the way the lands had been laid off until a couple of years before he gave his deposition, and that such complaints came from the said Hale. This was after the said Hale had ceased to be connected with the company otherwise than as the agent and tenant of the said Halstead. Hale denies that he was present or had any connection with the division as made by said Robson. In this he is unquestionably mistaken. He alleges as a reason why he was not present when it was made, that he was called away about the middle of September, 1859, and that he remained in New York two or three months, and he says the partition was made in the fall of 1859, somewhere between September 25th and December 1st. He admits that he was president of the company and had been at the property from June 1859 until the middle of September, when he was so called away. The partition was made by Robson not in the fall but certainly before August 4th, 1859.

It is admitted by Halstead, in his deposition aforesaid, that one McKinney was present at the time of the division. Robson says that his recollection is that he was present.

On page 24 is found a letter from McKinney to said Grinnan, as printed, dated Aug. 9th, 1859, but really dated Aug. 4th, 1859, in which McKinney details with great minuteness the circumstances attending the division, and enclosed in said letter a plat showing the parcel laid off to the said company, also the boundaries and abuttals of the same as surveyed by said Robson. If this division had not then been so made, it would have been impossible for such papers to have been then in existence.

The boundaries and abuttals as enclosed in said letter which were bound to be made up before the said date, August 4th, 1859, and doubtless were made at the time of said division, are as follows: See page 24.

"Forest Hill frontage, as surveyed by Thos. S. Robson under directions of J. M. McKinney and Dr. Hale and Mr. Eames, begins at a large sycamore on bank of Kanawha river at head of Wheeler's island; thence south 55¼°, west 460 poles to two pines on a ridge in a line of original survey; thence with said line south 33° (33°) E. ten poles to a stake on said line; thence north 54¼° east 126 poles to a lynn, maple, dogwood and ironwood on north hillside; thence north 80°, east 84 poles to a pine, gum and

chestnut on a point of a ridge; thence north 60°, east 224 poles to a beech on the bank of the river; thence north 35°, west 70 poles down and with river to the beginning, containing about 105 acres.

These boundaries and abuttals correspond exactly with the boundaries and abuttals which accompany all of the several plats of said division as found at different places in the Record, and the plat enclosed in said letter of the parcel so laid off is in shape exactly the same as the other plats of such part.

McKinney in the said letter says that after reaching Huddlestons "I waited there the arrival of Dr. Hale and Mr. Eames and proceeded to have a survey made of the Huddleston tract and had one hundred acres set off as near as possible for the Forest Hill Co. * * * I enclose you a plat of the survey as made by Mr. Robson, the county surveyor."

Grinnan on page 137 says that he received this letter from the said McKinney. Grinnan afterwards filed the original letter with his affidavit which are found on pages 200 and 201 of the Record.

It will be noticed from an addendum to said letter, which is printed on page 201, that McKinney also enclosed to Grinnan the balance of Robson's bill for making said partition.

The record of said courses as made by said surveyor, and doubtless made at or about the time of such division by the surveyor who had no interest in the matter whatever, and who was an official, distinctly sets forth that the land was surveyed under the directions of J. M. McKinney and Dr. Hale and Mr. Eames.

This letter and this record of the surveyor are worth far more in point of reliability as to the time such survey was made and under whose directions it was made, than the statements of the recollections of interested and prejudiced witnesses given 30 years after the transaction. The record so made by Robson at the time of the work, confirms his deposition as to the fact that all parties were represented at the time the land ~~were~~ was so laid off.

The deposition of Richard M. Eames was taken in this casue and is at page 156 of the record. He admits that he was on the said property in the employ of the company during the years 1859 and 1860, and at the time Robson laid off the company's part of said tract, and that he thinks it was laid off in the fall, and that he also had a brother there in the employ of the company, and that his impression is that his brother did not accompany Robson

when he ran the division line, and that his impression also is that Hale was not there. This latter Eames was named Henry H. Eames. And that neither he nor his brother had anything to do with the division or running the lines made by Robson.

The deposition of Henry H. Eames was not taken in the cause but his affidavit was taken and filed in said cause and is on pages 205–6.

In this affidavit he says that he "has a distinct recollection of Robson laying off to the Forest Hill company that part of what is known as the "Huddleston tract," purchased by said company from Messrs. Smith and Grinnan, lying next to the Kanawha river. My brother and I were at Forest Hill at the time, and, as the Forest Hill company were about erecting several buildings for the purpose of developing the company's property, we were anxious to know where the dividing line would run from the river back to the hills, in which portion the company had decided to locate their buildings. Both I and my brother took an interest in this survey made by said Robson to this extent, but took no further interest in it at that time, as we were otherwise engaged."

He admits in said affidavit that he and his brother did take an interest in the location of a part of said division line as the company were about erecting several buildings for developing the company's property.

McKinney in his letter of August 4th, says, "I think, though it was of great importance to all parties that the survey and the divisions of the Huddleston tract should have been made at once. It enabled the parties to commence operations at once, exploring their coal beds and breaking ground for their work," and the proof plainly shows that these works were in part erected before October, 1859, in fact commenced immediately after the line was run, and as Eames says the line was run before the works were commenced, therefore the line must have been run long before the fall of 1859.

Henry H. Eames, in his said affidavit, page 206, says "that Robson gave me the plat in the absence of C. F. Hale," and he attaches a copy of the plat and notes so handed him. This is the same plat and the notes referred to in the affidavit of A. Burlew, pages 195–6–7–8, and in the depositions and affidavit of Halstead and the depositions of Hale and which, some of them are pleased

to swear with great force, were the original plat and notes of said partition.

And the whole foundation of the claim that this division took place in the fall of 1859, instead of earlier, is based upon the fact that at the bottom of the said copy of notes of said division is the date, October 14th, 1859. They are plainly not the original plat and notes made up by the surveyor at the time or about the time he did the work, but are merely copies made and furnished by the surveyor to the company at a subsequent date, to-wit: October 14th, 1859, and they show this fact upon their face. Upon the said plat, page 198, the surveyor put upon the plat so furnished the word "copy" so as to show that it was not the original, and he put at the bottom of the notes of the survey "fee 50 cents," which was the fee allowed him by law for making the copy, and McKinney, p. 27, in his said letter dated August 4th, says that the making of the division enabled the company to break ground for their buildings. This was certainly before the date of his letter.

Hale in his deposition says that they examined the division line as run by Robson in part in order to be sure that their buildings were properly located, and that it is his recollection that he had a copy of Robson's survey with him at that time. (See bottom of pages 132 and 133.)

What could be more convincing that this division was made in the summer of 1859, as stated by McKinney in his letter, and not in the fall, and that the claim that the map and notes filed with the affidavit of Burlew are not the originals but mere copies, and that the date, October the 14th, in said copy, is merely the date as the same was made from the surveyor's original plat.

But is it possible that Halstead can disturb this partition at this late day, even if the position he now takes had once been tenable? The partition was made a quarter of a century before the bill was filed. The plat and notes of the partition were delivered to the company soon after the partition was made, and the company had full knowledge of it, in fact the plat was posted upon the wall in the company's office in 1859.

Question 14. "Examine the map I now show you filed with the deposition of Charles F. Hale taken in this cause marked Exhibit B and state where and when you first saw the map or a copy of it."

Ans. "I think sometime in the fall of 1859 at Forest Hill in

the office. It was put up against the wall the first time I saw it."

Eames deposition page 151.

Hale, the President, knew of its existence in 1859, and it was then among the papers of the company in their office, and it has remained in his and Halstead's possession ever since. It is also shown that the company in 1859 took possession of the part laid off by Robson according to its boundaries and abbuttal, fenced a part of it according to such boundaries and abuttals, built a factory and numerous houses upon it, mined, coal and carried on operations upon it, and it and said Halsted have ever since limited their operations, their control and possession according to such boundaries and abuttals, and exercised no control or ownership whatever upon the part of said tract left by said partition to said Grinnan, and made no objections to such partition until about the time this suit was brought. See deposition of Hale, page 119, *et seq.*

If they did not know that the part so laid off did not adjoin the Company's land in 1859, they certainly did know this fact in February, 1861, when Robson, at said last date, made, at the instance of the Company, a survey of all their lands and returned them the plat found at page 149, and which plainly shows that they did not so join. This as before stated was about 23 years before this suit was brought.

Hale, the President of the company, certainly at this time knew that the two tracts did not join. See his answer to 33rd question.

Answer "No such authority was ever given by Halstead or the Forest Hill Company or myself. In fact it was not till about two years afterwards that any of us knew that the two tracts did not unite. I mean by that that the portion of the Huddleston tract set over to the Forest Hill Co. did not unite to the 2,000 acre tract, page 124.

No part of the Huddleston tract joined the 2,000 acre tract even on the east side thereof at the time this cause was heard and decided, and the only possible connection that could have been made by any partition of the Huddleston tract with the 2,000 acre tract would have been only at the corner marked figure 4, and this would surely have furnished no practicable connection between the two tracts, as it appears from the deposition of the said witness Hale, taken before said decree that Halstead had lost the 95 acres marked on the map at page 149 "95 acres claimed by William B. Buster" which extends from the said black letter "B" to said black figure "4"

and this is conceded to have been the fact in the appellants original brief. See brief, page 33. So that if the court had granted the relief asked for by the appellant Halstead it would have simply disturbed the original partition for the purpose of joining the Forest Hill part of the Huddleston tract on to the lands of strangers, to-wit: William B. Buster's heir.—page 130.

It is said in the brief that the appellant, Halstead, has since purchased this ninety-five acres. Of this we know nothing, and his purchase since the decree was rendered cannot change the equities of the cause as they stood at the time of the decision.

The witnesses for appellant have much to say about their possessions. There is sometimes mentioned in their testimony the possessions of Estep, Smith and Giles, on Tucker's Fork. These it will be noticed from the evidence, were on the first large right-hand fork of Armstrong's creek, passing up into the 2,000 acre-tract by the black letter "A" on the map at page 149, and which possessions were wholly within the 2,000-acre tract, p. 120.

Neither the company nor Halstead ever had any possession after the division of the part left to Grinnan, but Grinnan had possession of the same. The evidence of Robson, the agent of Grinnan, upon this point is as follows.

Ques. 16. "State what, if any, possession the Forest Hill Company took or had of that portion of the Huddleston survey, which was laid off to Grinnan by the division line which you run, as stated by you?"

Ans. 16. "None at all, I know that because I was agent of Grinnan until he sold the land.

Ques. 17. Please name the tenants or parties who were on the Grinnan part under Grinnan, and locate as well as you can where they lived?

Ans. 17. James Jarrett. He lived on the south end of that part of the Huddleston laid off to Dr. Grinnan.

Ques. 18. How long was he there as tenant under Grinnan?

Ans. 18. There was no writing to show that he was a tenant of Grinnan at all, only a verbal contract between him and myself that he should hold it or remain there until orders from Grinnan or his successors give it up. He was there over 15 years—from the end of the war until he died.

Ques. 19. How far did he live from the division line run by you?

Ans. 19. About 200 yards, I think.

Ques. 20. How close did his clearing or enclosure go to the division line of the Huddleston tract?

Ans. 20. About 50 yards, as well as I can remember.

It appears from the deposition of Hale, that he also claims this man as a tenant of Halstead, and says Jarrett had paid him rent for years as such tenant. It seems from the evidence that the possessions of this man Jarrett were partly on the 2,000-acre tract, and partly on the part of the Huddleston tract left to Grinnan in the partition thereof and from the evidence he was capable of being the tenant of Halstead as to a part of the 2,000 acres occupied by him, and the tenant of Grinnan as to that part of the Huddleston tract, page 162–3.

The testimony of Hale as to this tenancy is very questionable, as in his first deposition he makes no such claim, and says that he had investigated this tenancy and his evidence in respect to it is as follows:

Ques. 28. Do you know where Jarrett lived?

Ans. Yes.

Ques. 29. Was it not on said Huddleston survey, east of said division line?

Ans. It was on land claimed by William Buster. I thought at first it was on the Forest Hill tract, but investigated and found he was on Buster land.

Ques. 30. Was not Jarrett a tenant of Wyant, paying rent to him, and has not Mooney since Jarrett's death occupied the place?

Ans. That is a matter I don't know anything about.

In his second deposition he professes to know exactly where Jarrett lived, the land he lived on, that he had been there as the tenant of Halstead under him, and had paid him rent for years as such tenant. These two depositions cannot be reconciled with each other, page 164.

It plainly and distinctly appears from the evidence that at no time did either the company or Halstead have any possession whatever of the part left to Grinnan. They confined their possession absolutely and unqualifiedly, as to the Huddleston tract, to that portion thereof which had been partitioned off to them, and, according to the lines and corners as run and marked by Robson on the ground in said partition.

Hale's deposition on this question is positive.

Q. 31st. Has the mining company or Halstead had any improvements or possession on the eastern side of said division line?

Ans. No. page 129.

The western side of said Huddleston tract is the side down the Kanawha river.

Q. 18. Which is the westerly side of the Huddleston tract as laid down on said map?

Ans. The lower portion; that lying farthest down the river. (Hale's first deposition, page 121.)

It appears that in front of the upper part of the Huddleston tract, on the Kanawha river, Grinnan also owned what is known as the Brannon survey. And as it was evidently to the interest of the company that it should have as large a frontage as possible on the river, as Robson says, the parties agreed that the frontage of the Huddleston tract should be divided equally, and as this would place a part of the Brannon tract in part between the part so to be assigned and the river, it was agreed that 5 acres of the Brannon tract should also be conceded and assigned to the said company, and it was accordingly so done. This agreement of division gave to the company a greater amount of front lands than they would have been entitled to under the strict construction of the deed. See Robson's original plat of division, page 148.

It also appears that under judicial proceedings in the circuit court of Greenbrier county, the parcel of the Huddleston tract left to Grinnan, was sold on the 12th day of April, 1883, and purchased by the defendant, William Wyant, for a large sum of money, which sale was confirmed by said court on the 27th day of April, 1883, and that said purchaser, before the institution of this suit, had paid a large part of his purchase money for said land. It also appears from the depositions of John W. Harris, that before he made such sale as the commissioner of said court, he employed a surveyor, H. J. Tucker, to survey the part so left to said Grinnan, and it appears from the deposition of the said Tucker that he made the survey of the division lines as Robson had marked them in 1859, and that the said Hale then the tenant and agent of said Halstead pointed out to him on the ground a part of the said division lines, and made no objection or question to them as the correct division line. It also appears from the deposition of the witness, A. G. Ansted, that said Hale objected to the cutting down of a certain tree on said lines, on the ground that it was a

line tree in said division, and that said Hale had taken the rock off the Grinnan part by the permission of Grinnan.

Ques. 20 and answer p. 163.

It appears from the deposition of the said Wyant, that of his purchase money of $9,000, he had paid all but $3,200, and that he had put out by way of opening mines and building houses on the part so purchased by him the sum of $7,000 after his said purchase, and that no objections, warning or protests were made by the said Halstead or his agent, Hale, or any notice of any claim on the part of said Halstead, given to the said Wyant, although the said Hale, the agent, lived within a few hundred yards of the property and saw the said Wyant almost daily, and knew of the said Wyant's purchase the day after he made it.

It also appears from said deposition that in the year 1880, the said Hale pointed out to the said Wyant the Robson line between the two properties, and told him that the parcel above it belonged to people living in Old Virginia, and that he had nothing to do with that property.

It also appears from said deposition that the said Wyant had no notice of the claim of the said Halstead until the institution of this suit.

If Wyant should be disturbed in the land as purchased by him, he could get no relief, as it has been decided a judicial purchaser in West Virginia purchases caveat emptor.

It is plainly evident that no objection was ever made to the said partition until about the time this suit was instituted, and that the allegations in the bills of complainant that it was repudiated immediately after they found out its location as to the other tract of land, are utterly untrue. For instance the averment found on page 183.

"Your orator says the first time he has any recollection of Grinnan ever setting up any claim to the strip of land, which separates the part of the Huddleston tract laid off in 1859, from the Forest Hill tract of 2,000 acres, was in 1883."

Contrast this with the statement contained in his (Halstead's) deposition on page 116, which is here again quoted: "For several years A. G. Grinnan had been urging me to buy his adjoining tract, and I told him that I already had too much unproductive property on hand. But in the year 1880, I wrote him to this effect: "That I would like to make the connection between the

front and back land more complete, so that it would show to better advantage on the map, and that I would give him one hundred dollars for so much of the land as he ~~needed~~ would running back from about where the Wilson line crosses the track.' "

This is the identical strip referred to in the said allegation.

At this late day to re-partition this tract of land by assigning to Halstead an additional quantity of land at the rear thereof would necessarily disturb the line of division on the front, and such new line in the front would doubtless interfere with their houses, coal openings and mining operations and inflict great injustice upon the parties.

As before stated it is utterly impossible, according to the provisions of the deed from Grinnan and Smith to the company to make the partition in such way that the part to be set off to the company from the Huddleston tract will adjoin the 2,000 acres on the *south* end thereof. If there was any contract at all that it should adjoin it, it was to be on the south end. There was no agreement, contract or statement whatever, that the part to be laid off from the said Huddleston tract to the company should adjoin the said 2,000 acres on its east side and for a court to so decree, as before stated, would be making a new contract between the parties.

The bill in effect is this: It avers that the contract was that the piece to be so laid off from the Huddleston tract to the company, was to adjoin the 2,000 acres on the south side, and that it was so understood by parties, and that it is an impossibility owing to the situation of the two tracts that they can be so joined, and therefore asks the court to decree another junction of them in a different way and at a different place.

This we conceive a court of equity cannot do, as the doctrine of "cy pres" applies only to wills and not to deeds. The only relief which could be obtained on a statement of this kind would be a recision of the contract. This the plaintiff does not ask, and if he did could not obtain at this late day under the facts in this case.

The court will notice that there is no agreement in the deed for an equal division of the Huddleston tract. The sale was of "a certain piece or parcel of a certain tract of land known as the Huddleston tract to be surveyed off of the western side of said tract by a line running from the northerly to the southerly side of said

tract to be bounded on the south by the tract hereinbefore conveyed, and on the north by the Great Kanawha River, and containing one hundred acres, more or less."

In the deed from the company to Soutter, trustee, it is described as follows: "Also a lot, piece or parcel of land containing one hundred acres, to be surveyed off the west side of the tract of land known as the Huddleston tract, adjoining the above.

In the partition made by Robson the company got not only the hundred acres but five acres additional off of the ~~Grinnan~~ Brannon tract.

The deposition of a witness, John L. Cole, was taken on behalf of appellant and is found at page 159.

In reply to Question 4, as to whether the part so purchased by the Company from the Huddleston tract could be so laid off as to make a junction with the 2,000 acre tract says, in effect that it can be so done and suggests a decidedly original and novel plan for so doing, one not provided for by the deed but such a one as would destroy the value of both parcels and would make the two tracts adjoin on the east side and not on the south side as stated in the deed. His criticisms on the way Robson laid it off are without the slightest foundation. Robson laid it off according to the deed by running the line from the northerly to the southerly side, and if the 2,000 acre tract had been where the parties supposed it was, they would have joined at the south side as stated in the deed, but not being there they did not join and these facts afterwards being ascertained the witness Cole would join them on the east side without any contract, agreement or understanding that they should adjoin on such side.

Before the hearing of the cause an agreement was signed by the counsel of the parties waiving certain objections to the depositions and also objections to the plat, survey and the letter filed with the answer of Grinnan, on account of the fact that the latter were copies of said papers, p. 191. The cause was then argued, considered by the court and decided against Halstead. After the decision, Halstead filed a petition for a rehearing, and filed in support of it an affidavit of his counsel, A. Burlew, and subsequently other affidavits. In substance, the sole ground of said rehearing was that the plat, and copy of the division and the copy of the McKinney letter, filed by Grinnan with his answer as found on pages 24 and 25, were spurious and fictitious documents, and that

before said agreement, counsel for the defendant had stated to the court that there was not doubt that said copies were true copies from the original papers in the hands of A. G. Grinnan, and that affiant, after a night's reflection, recollected that he had had the original map and survey in his possession made by T. S. Robson of the land involved in said causes in 1859, and that he might then have said original map, and that he found that the copy of the notes in his office was not the copy filed by said Grinnan, and that the notes found in his office did not say anything about Mr. Kinney, Hale or Eames being present when it was made, therefore the ones filed by Grinnan must be spurious and fictitious.

Said agreement, petition for re-hearing and affidavit of Burlew are at pages 191-2-3-4-5-6-7 and 8, and a copy of said notes and plat, which were found by said Burlew, and which he states are the originals are on pages 198-199.

There was absolutely nothing whatever new in this find as the notes and plat, filed with said affidavit, are the identical notes and plat which were filed in the cause with Hales deposition on the 14th day of April, 1887, as exhibit "B," more than a year before the hearing. The notary at the taking of said deposition had made a copy of said notes and plat and filed them with the depositions in lieu of the originals, and delivered the originals back to Halstead or his counsel. See page 134. The copies filed with said affidavit had the notarys certificate on it to that effect. See page 198.

These are the same plat and notes which we have hereinbefore shown to be simply copies made by Robson from the ones kept by him and evidently handed either to Hale or some agent of the company, sometime after the division was made. The plat and notes, as filed are on one sheet of paper and the word "copy" written thereon by the surveyor and a memorandum of his fee written at the bottom for making such copy and the date thereon evidently the date on which he made such copy, and these identical papers were in the record at the hearing and the cause was heard upon them, and such differences as might exist between them and the copies filed by Grinnan, were matters for consideration and were considered by the court on the hearing.

There is absolutely no testimony whatever that the copies filed with the answer of Grinnan, are, in any respect whatever, spurious fictitious or forged.

The affidavit of Grinnan filed in response to the rehearing and the affidavit of said Burlew absolutely and completely refutes each and every charge contained in said petition and affidavit of Burlew.

The court on the hearing of said petition dismissed the same.

It is humbly submitted that there were no equities shown by the complainant entitling him to the relief prayed for and that the decree of the circuit court denying the relief asked for and dismissing his bills should be affirmed.

All of which is respectfully submitted.

W. Mollohan
Counsel for
Appellee Grinnan

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IN THE

Supreme Court

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JOHN HALSTEAD, *Appellant*,

vs.

A. G. GRINNAN AND OTHERS, *Appellees.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTICT OF WEST VIRGINIA.

BRIEF OF COUNSEL FOR WM. WYANT, APPELLEE.

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PLEADING.

The original bill was filed in 1885, for the *partition* of a tract of 200 acres of land situate in Fayette county, West Virginia, known as the "Huddleston tract," claiming for the complainant an undivided half of it.

The amended bill, filed in 1887, *concedes* a division in 1859, but alleges *mistake*, and asks a change in the division lines.

The answers deny that the complainant or his vendors ever had an *undivided* interest in the land, but instead, an interest in *severalty, in* 100 *acres* of it *to be laid off the western side* of the tract; and show that it was so laid off, by the parties, by actual survey in 1859; and the division accepted and adopted by the parties, and acted upon by them from that date until the bringing of this suit, more than twenty-five years; further, that the defendant, Wyant, had bought the residue of the tract in 1883, at judicial sale, in a suit to which *Halstead*, the complainant in this suit, was party, and in which the boundaries of such residue were determined by survey based upon the division so made in 1859; the defendant Wyant paying for same upwards of $9,000.

The answers set up as defence, the division of 1859; that it was correctly made, and was acquiesced in by both parties for more than twenty-five years without question, and until long after Wyant's purchase; relying,

First.—Upon the correctness of the division.

Second.—Upon the long acquiesence of the parties therein.

Third.—Upon the *estoppel* by the decree of sale and confirmation to Wyant, and

Fourth.—Upon the plea of *laches*, on the part of the complainant in delaying for twenty-five years to file his bill.

STATEMENT OF THE CASE.

June 15th, 1859, *W. K. Smith* and *A. G. Grinnan* and wives conveyed to the *Forest Hill M. & M. Co.*, a corporation, 2,000 acres of land situate in Fayette county, then *Virginia*, now *West Virginia*, and known as the "Forest Hill Tract."

"Also a certain *piece* or *parcel* of a certain tract of land known as the Huddleston tract, to be surveyed off of the western side of said tract by a line running from the northerly to the southerly side of said tract, to be bounded on the south by the tract herein above conveyed, and on the

north by the Great Kanawha River, and containing one hundred acres, more or less." Record, p. 7, Ex. B.

This clause is the foundation of the complainant's title, and the basis of his claim for an "*undivided one-half interest*" in the Huddleston tract.

On the day of the date of the last mentioned deed (June 15th, 1859,) the grantee conveyed the same lands by like description to *Robert Soutter, trustee*, to secure certain notes and bonds given for the purchase money—amounting to $48,200, with like clause that the 100 acres, part of the Huddleston tract, should be laid off the west side of the tract. Ex. D, Record p. 11.

In the fall of 1859, *i. e.*, in August, as claimed by the defendants, or October, as claimed by the complainant, this hundred acres *was* run off and set apart to the Forest Hill Co., and a plat of same made and furnished to both parties, and the lines marked upon the ground, whereupon the Forest Hill Company took possession of the part so set off to it, and put up its buildings and improvements upon the part so assigned to it. Record p. 140, ans. 4, p. 142 ans. 15 and 16, p. 128 ans. 18, 20, 24 and 25, p. 124 ans. 34, p. 133 ans. 2, p. 154 ans. 35 and 36.

In 1861 the Forest Hill Company had the whole of their lands carefully surveyed and platted, showing both the 2,000 acres and the one hundred acres so set off from the Huddleston tract, adopting the division and lines of 1859, and showing the relation of the two tracts to each other and their relative positions. See R., p. 124 ans. 34, p. 141 ans. 11 and 12, and map p. 149, T. S. R. No. 2.

June 6, 1864, the complainant, *Halstead*, who was one of the original stockholders in the company, having bought up part of the indebtedness secured by the trust, forced a sale under the deed and became the purchaser of the whole property for $3,500, and took conveyance from the trustee bearing that date.

This deed of June 6, 1864, from *Soutter*, trustee, to Hal-

stead is the complainant's sole source of title; it recites the sale; it conveys the 2,000 acres by reference to the trust deed; and, the 100 *acres* of the *Huddlestou tract* in the following language:

"Also a lot, piece or parcel of land, containing one hundred acres, more or less, provided in said deed, to be laid off the west side of the tract of land known as the Huddleston tract, *as the same was ascertained and bounded by the survey made subsequently to the execution of said deed*, and *in pursuance thereof.*"

Complainant, upon his purchase in 1864, took possession of the 100 acres so set off, and by this deed, granted to him; also of the 2,000 acres, and held the same according to the description of his deed, *i. e., as the same was ascertained and bounded by the survey made subsequently* to the execution of the deed of trust, *i. e.*, as *laid off in* 1859, the lines of which are those claimed by the defendants, and well marked on the ground, and uudisputed as to identity. (See record p. 133, ans. 2; p. 175, ans. 4; p. 174, ans. 2; p. 172 and 149, maps. *Grinnan*, grantor of the company and owner of the residue, shortly after the division of 1859, took possession of such residue, by Robson's division lines, and by his tenant, held and claimed to it until the purchase by Wyant in 1883, who continued to hold it until the bringing of this suit, and still holds it.

From the *undisputed* evidence, certain things are clearly established, *i. e.*

First, That Halstead and his vendors never had any "undivided half interest" in the Huddleston tract, but instead, the right to one hundred acres *in severalty*, to be laid off the west side of the tract.

Second, That this 100 acres, more or less, was so laid off in a few months after the date of the deed; *Robson* in fact assigning 105 acres to the Forest Hill Co.

Third, That, this division was approved and acted upon by the parties.

Fourth, And its exact location by metes and bounds, and as regarded the 2000 acres, fully known by the company.

Fifth, And also was approved and adopted by the *trustee*, *Soutter*, as appears from his deed to the complainant.

Sixth, And accepted and adopted by the *complainant*, as as appears from his acceptance of the deed from Soutter, trustee, and claim under it.

The complainant's proofs make the defendants' case. We refer to the deed to the company, and the deed from the trustee to the complainant, just quoted; the first providing that the 100 acres *should be* laid off the west side, and the second stating that it *had been done*, ratifying it *as done*, and conveying to the complainant, not by the floating line mentioned in the first deed, but by the fixed line "*as ascertained by survey*" subsequent to the first deed.

Whatever may have been the errors in the survey, nevertheless, by *this deed*, its boundaries became the plaintiff's boundaries, and still are such.

We refer to the plats and survey filed by the complainant. (Record p. 204–5), identical with the plats and survey filed by the defendants. Record p. 24–148 and 198.

Charles F. Hale, agent, tenant and witness of the complainant, *Halstead*, says, R. p. 124 ans. 34:

"The surveys were made and the lines were run by Robson, the county surveyor, at the time; and to be best of my knowledge and belief, it was done on the orders of Grinnan. It was part of their agreement with the Forest Hill Company that the survey should be made, and that the lines should be run properly. I was in New York when Grinnan had the lines run by Robson, and when I came back *in* 1859, I learned for the first time that the lines had been run, and the division had been made. This survey was made and lines run in the fall of 1859. In reference to the authority for running those lines and for making the division, a man from New York by the name of *McKinney*, had been sent out here by Smith and Grinnan, to over-see the survey and division, and of course, I presume, to act as

their agent in the matter. The surveyor furnished us only with a plat of the *Huddleston* tract—that is, the portion *that belonged to us.* The whole tract of 2000 acres was surveyed by *Robson* some time about *February,* early in 1861, and after *that* survey was made, we had a plat given us not only showing the 2000 acres, but also the *one hnndred acres* of frontage. It was *then* for the first time that we knew, or indeed had any suspicion that the Huddleston frontage did not unite with Forest Hill tract. This occured at the beginning of the war, in 1861."

One of these maps and surveys is found, Record p. 134 the other p. 149. See also pages 126–140–141 and 165 Ans. 8.

Complainant's witness, *Hale,* further says, R. p. 127:

Ans. 8. "That survey is dated Oct. 14, 1859; I returned from New York during the early days of Dec. following."

Ans. 9. "I can't remember who handed it to me, it was lying with other papers in the office. And some one in the office handed it to me. I received it immediately after my return."

10 Ques. (p. 128)" Were you at that time President of the company?"

Ans. "Yes."

11 Ques. "Where has the plat been since then?"

Ans. "It has been in my hands most of the time. Mr. Halstead has had it part of the time, also."

13 Ques. "Are not the lines of this 105 acres so laid off to the Forest Hill Company, well marked upon the ground by natural monuments, such as trees, &c.?"

Ans. "Some of them are and some are not."

Ques. 18. "Have you not as the agent and representative of the Company and John Halstead, resided on *that portion* of the Huddleston tract, embraced by the 105-acre survey *which was so set apart to it,* from the time of the purchase of said land in 1859 to the present time, excepting the time you were absent during the war?"

Ans. "Yes."

Ques. 20. Did you, or Halstead, or the Company, ever *object* to the division line so run by *Robson* in Oct. 1859, as laid down and shown on said plat and survey, as Ex—, and if so when, where and to whom?"

Ans. "I do not know that any objection was made to it until *lately*. We had no opportunity of doing so. I think however that Halstead mentioned the matter to Grinnan some years ago."

Ques. 23. "Was there any *other* division line run or *claimed* by the Forest Hill Co., or by Halstead?"

Ans. "No."

Ques. 24. As to improvements by the Company and Halstead?

Ans. "There were six or seven dwelling houses, small cottage houses, a coal mine and oil factory, and all the necessary machinery and plant, and my own house, some twelve or fifteen acres enclosed in fence and cultivated; there was a blacksmith shop, cooper shop, barn and stable."

Ques. 25. "Were not said improvements confined *exclusively* to the *western side* of the *division line* drawn by *Robson* as shown by Ex. B with this Deposition?"

Ans. "Yes."

Ques. 26. "Were not a part of the fences around the enclosures built on and along said division line?"

Ans. "I believe they were, part of the way."

P. 132, Ques. 2. by Complainant.

"In looking at the division lines as run by Robson in 1859, did not the Company simply at that time look to that part of the division line running a short distance back from the Kanawha river *in order to be sure that their buildings were properly located?*"

Ans. "Yes, that is certainly so."

Page 133, Ques 3. "You spoke of noticing the location of the division line as run by Robson for the purpose of locating the place for the buildings of the Company, how did you determine the proper location?"

Ans. "The location of the line was marked by a *post* and also by *marked trees*."

Ques. 3. "Had you with you at the time of locating the place of the buildings, Robson's survey, Ex. B with this deposition?"

Ans. "I think I *had*, but am not sure of it."

Page 162, Ans. 9.

"Under the agreement of *Smith* and *Grinnan* with *Forest Hill Company* it was their duty to lay off this portion of the Huddleston tract that belonged to the Forest Hill Co. under their deed. *This they did*, employing the then county

Ques. 16. "State what, if any, possession the Forest Hill Company took or had of that portion of the Huddleston survey which was laid off to Grinnan by the division line which you ran as stated by you?"

Ans. "*None at all.* I know because I was agent of Grinnan until he sold the land."

Ques. 17, as to tenants of *Dr. Grinnan.*

Ans. "James Jarrett; he lived on the south end of that part of the Huddleston tract laid off to *Dr. Grinnan.*

Ans. 18. "He was there over 15 years—from the end of the war until he died."

Dr. Grinnan in his deposition, R. p. 136 and 199, fully corroborates Robson. See also depositions of *Wm. Wyant*, R. p. 170; *A. G. Ansted*, R. p. 173; *H. J. Tucker*, R. p. 174. These read with the letter of *J. M. McKinney*, and the copy of the survey, found on page 24 of the record, leaves no room for doubt, especially as the *letter* and *survey* are *writings* contemporaneous with the survey, and are not liable to the treacherous slips that so often affect human memory. The survey begins:

"Forest Hill frontage as surveyed by T. S. Robson under the *direction* of *J. M. McKinney* and *Dr. Hale* and *Mr. Eames:* Begins at a large sycamore, &c. &c."

The letter is from New York, is dated Aug. 9, 1859, encloses the survey, and in every line shows internal evidence of its truthfulness—fully refuting the claims by *Hale* that he was in New York at the time, and corroborating the testimony of *Robson.*

We submit that whether there was a mistake in the original survey or not—the long acquiesence of the parties, in it, and especially after the full knowledge of location afforded by the survey of 1861, precludes an attack at this late day; and still more especially after the sale in 1883 to Wm. Wyant for the large sum of $9,324.56 at judicial sale, based upon a survey in that cause, founded upon the division of 1859, the same that had been so acquiesced in, then for upwards of 23 years.

I.

Long *acquiesence* of itself fixes the right.

Boyd's lessee v. *Graves*, 4 Wheat. 513.

Guynn v. *Schwartz*, 32 W. Va. 487–500.

As said by Judge RHODES in *Sneed* v. *Osborn*, 25 Cal. 626.

"The authorities are abundant to the point, that when the owners of adjoining lands have acquiesced for a considerable time in the location of a division line between their lands, although it may not be the true line according to the calls of their deeds, they are thereafter precluded from saying it is not the true line."

See, also, *Jackson* v. *Dysling*, 2 Caines, 198;
Kip v. *Norton*, 12 Wend. 127;
Terry v. *Chandler*, 16 N. Y. 354;
Vosburg v. *Teator*, 32 N. Y. 568;
Smith v. *Hamilton*, 20 Mich. 433;
McNamara v. *Seaton*, 82 Ill. 498.

II.

And *laches* in asserting a right, bars the remedy, and especially when the rights of others have intervened.

As said by Mr. Justice BREWER in *Naddo* v. *Bardon*, 2 C. C. A. (51 Fed. Rep. 493).

"No doctrine is so wholesome when wisely administered as that of *laches*. It prevents the resurrection of stale titles, and forbids the spying out from the records of ancient and abandoned rights. It requires of every owner that he take care of his property, and of every claimant that he makes known his claims. It gives to the actual and longer possessor security, and induces and justifies him in all his efforts to improve and make valuable the property he holds. It is a doctrine received with favor, because its proper application works out justice and equity and often bars the holder of a mere technical right, which he has abandoned for years, from enforcing it when its enforcement would work injury to many."

See, also, *Banks* v. *Carpenter*, 101 U. S., 567;
Wagner v. *Baird*, 12 How., 209;
Badger v. *Badger*, 2 Wal., 87;
Golden v. *Himmell*, 99 U. S., 201;

Taylor v. *Holmes*, 129 U. S., 387;
Richards v. *Markall*, 124 U. S., 183;
Speidel v. *Henrici*, 120 U. S. 377;
Davidson v. *Davis*, 125 U. S., 90;
Pratt v. *Vatliere*, 9 Pet., 405;
Grimes v. *Saunders*, 93 U. S., 55;
Harwood v. *R. R. Co.*, 17 Wal., 81;
Whittaker v. *Imp't Co.*, 34 W. Va., 217–229;
Trader v. *Jarvis*, 23 W. Va., 100;
Curlett v. *Newman*, 30 W. Va., 182;
Pusey v. *Gardner*, 21 W. Va., 470;
Walker v. *Ruffner*, 32 W. Va., 297;
Strong v. *Strong*, 102 N. Y., 69;
Sewiking v. *Litzer*, 31 Ind., 13;
Hunt v. *Blanton*, 89 Ind., 38;
Cox v. *Montgomery*, 36 Ill., 396;
Barnett v. *Barnett*, 83 Va., 504;
Laidley v. *Pennybacker*, 33 W. Va., 624;
Doggett v. *Helms*, 17 Gratt., 96;
Smith v. *Clay*, Ambler R., 645;
Carr, Adm'r, v. *Chapman's Legatees*, 5 Leigh, 164;
Hayes v. *Good*, 7 Leigh, 452 and 171;
Liverpool v. *LeGrand*, 125 Mass., 490;
Shorter v. *Smith*, 56 Ala., 208;
Harlow v. *Lake Superior Iron Co.*, 41 Mich., 583;
Spaulding v. *Farwell*, 70 Me., 17;
Sergeant v. *Biglow*, 24 Minn., 370;
Hume v. *Long*, 53 Iowa, 299;
McCoy v. *Poor*, 56 Md., 197;
Pipes v. *Smith*, 5 Col., 146;
Walet v. *Haskins*, 68 Texas, 418;
Smith v. *Thompson*, 54 Am. Dec., 126;
Cholmondeley v. *Clinton*, 2 Jac. and Walk., 1;
Beckford v. *Wade*, 17 Ves., 86;
Barney v. *Redgard*, 1 Cox Cases, 145;
Harrington v. *Smith*, 1 Bro. Par Cases, 95.

3 Bro ch. p 638

Makall v Casilears et als 137 U.S. 556
Martin v Gray 142 U.S. 236
Underwood v Dugan 139 U.S. 380
Gallisher v Cadwell 145 US 368
Hammond v Hopkins 143 US 224

III.

The complainant is *estopped* by the *decree* of *sale* and *confirmation*.

He was a party, by order of publication, to the suit, in which the survey and sale to Wyant, was made and confirmed.

This proceedure was under sections 11, 12 and 13 of ch. 124 of the Code of West Virginia.

"§ 11. On affidavit that a defendant is not a resident of this State; or that diligence has been used by or on behalf of the plaintiff to ascertain in what county he is, without effect; or that process directed to the officer of the county in which he resides or is, has been twice delivered to such officer more than ten days before the return day, and has been returned without being executed; or that the defendant is a corporation, and that no person can be found in the county upon whom legal process can be served, an order of publication may be entered against such defendant, * * * any order under this section may be entered either in court or at rules."

"§ 12. Every order of publication shall state briefly the object of the suit, and require the defendants against whom it is entered * * to appear within one month after the date of the first publication thereof, to do what is necessary to protect their interests; it shall be published for once a week for four successive weeks in a newspaper published in the county in which the order is made or directed. * * It shall be deemed duly published on the day of the fourth publication thereof. It shall also be posted at the front door of the court house of the county, wherein the court is held, at least twenty days before judgment or decree is rendered."

"§ 13. When such order shall have been so posted and published, if the defendants against whom it is entered, or unknown parties, shall not appear at the next term of the court, after such publication is completed, the case may be tried or heard as to them. * * Upon any trial or hearing under this section, such judgment, decree or order shall be entered as may appear just."

A decree entered under these sections while unreversed,

is in all respects, except as to creating a personal liability, as binding as if upon personal service.

To mitigate the rigor of this rule, the statutes of West Virginia provide, that a defendant so proceeded against may within five years, by petition, open and defend against the decree, but, however, with this *limitation*, *i. e.* that the *title* to property sold under such decree, shall not be disturbed by such proceeding, but the controversy transferred, to the *proceeds* of the property. The statutes referred to are found in section 14 of ch. 124, section 25 of ch. 106 and section 8 of ch. 132, of the Code of West Virginia; and are as follows:

§ 14, ch. 124. "Any unknown party or other defendant who has not been served with process in this State, and does not appear in the case before the date of such judgment, decree or order, or the representative of such, may, within five years from that date, if he be not served with a copy of such judgment, decree or order, more than one year before the end of said five years, and if he was so served, then within one year from the time of said service, file his petition to have the proceedings reheard in the manner and form provided by section twenty-five of chapter one hundred and six of this code, and not otherwise, and all the provisions of *that* section, are hereby made applicable to proceedings under *this* section."

Section 25 of ch. 106 of the Code of West Virginia above referred to is as follows:

§ 25 "If a defendant against whom, on publication, judgment or decree has been or shall hereafter be rendered in an action or suit in which an attachment has been or may be sued out and levied, as provided in this chapter, or his personal representatives, shall return to or appear openly in this State, he may, within one year after a copy of such judgment or decree has been, or shall be, served upon him, at the instance of the plaintiff, or within five years from the date of such judgment or decree, if he be not so served, petition to have the proceedings reheard. On giving security for costs which have accrued and shall thereafter accrue, such defendant shall be admitted to make defence against such judgment or decree, as if he had appeared in the case before the same was rendered, *except* that the *title*

of any *bona fide* purchaser to any property real or personal sold under such attachment shall not be brought in question or impeached. * *"

Ch. 132, § 8.

"§8 If a sale of property be made under a decree or order of a court, and such sale be *confirmed*, though such decree or order be afterwards reversed or set aside, the title of the purchaser at such sale shall not be affected thereby; but there may be restitution of the proceeds of sale to those entitled."

Halstead, it is true, within the five years filed his petition but it could in no wise impair the effect of these decrees of sale and confirmation, so far as the same theretofore protected Wyant, the purchaser, from the claims of *Halstead.* If Mr. Halstead shall establish *error* in these decrees, the *proceeds of the sale*, stand for his indemnity, but the *land* is gone forever.

The law-makers were willing to extend to the absent party, five years of grace, to avoid a possible wrong, but were *not* willing to permit this act of grace to work a *greater* wrong by unsettling the titles conferred by the courts, and depriving the vendees of the court of the security its decrees should vouchsafe.

COMPLAINANT'S MISTAKES.

It seems proper here to call the attention of the court to some palpable errors into which the complainant and his counsel have both fallen, and upon which the superstructure of their case, both in pleading and brief, is based.

First Error of complainant and his counsel:

They repeatedly assert that the deed of June 15, 1859, granted to the Forest Hill Company "an *undivided one half* interest" in the Huddleston tract.

The deed itself refutes the claim. See R. p. 7.

They seek next to sustain this assumption by reference to the deeds from *W. K. Smith* to *Grinnan*, dated the 1st day of October, 1857, and 29th day of October, 1857, respectively; and next by a misconstruction of the pleading

and decrees, in the cases of *Grinnan* v. *Long et al.*, and *Chewning* v. *Cowan et als.*, in which suits, *Wyant* became purchaser.

By reference to the deeds from *Smith* to *Grinnan* it will be seen, that *Smith*, owning the equitable title to the *whole* of the Huddleston 200-acre tract, by the first mentioned deed (Oct. 1st, 1857, Ex. C. C. Record p. 272) conveyed to *Grinnan* the "*undivided half*" of it; and by the second mentioned of said deed (Oct. 29th, 1857, Ex. C. p. 10) the *other* undivided half; the two deeds vesting in *Grinnan* the *whole* of the 200 acres, nearly *two years* prior to the conveyance to the Forest Hill Co. Thus it will be seen, that the mention of "undivided halves" in these deeds, have no relation whatever, to the conveyance in 1859, of 100 acres, more or less, off the west side of the tract.

In the bill of *Grinnan* v. *Long et als*, record p. 33, it is set forth that the deed above mentioned of Oct. 29, 1857, while absolute on its face, was in fact *in trust* for Smith's creditors, and that while by the face of these two deeds, Grinnan held the unconditional ownership of the *whole* tract, in fact he owned in his own right but the half acquired by the deed of Oct. 1, 1859, and held in trust the other half; also, that after deducting the 100 acres so sold and laid off to the Forest Hill Co., in 1859, there remained about 125 acres, which under these deeds was held by *Grinnan*, one undivided half for himself, and the other undivided half for Smith's creditors.

By the decree of July 10, 1882, R. p. 42, the court directed the sale of the lands so held by Grinnan *in trust*, to-wit:

"An undivided half of the tract called in the proceedings in this cause, the Huddleston tract, estimated to contain 125 acres."

Also, in order to pay debts decreed against *Grinnan*, "said *other* undivided half of said Huddleston tract, which half, was conveyed by *W. K. Smith* to *A. G. Grinnan*."

These two halves thus decreed to be sold, constituted the

whole of the 125 *acres, i. e.*, the residue of the Huddleston tract—after deducting the 100 acres sold and laid off to the Forest Hill Co.—and the term "undivided half" as used in this suit and this decree, had no relation whatever to that part.

To this suit and this decree *Halstead* was party. The Com'r appointed to make the sale thus directed, proceeded to sell *both* halves of 125 acres; *i. e.* the residue of the Huddleston tract, that is, the half of the residue owned by Grinnan and the half held in trust. He caused a careful survey to be made, (R. pp. 46, 47–43), which survey was based upon the *Robson* division in 1859, as pointed out by Hale, the complainant's agent and witness, to surveyor Tucker, (see R. p. 175) and was by the com'r exhibited at the sale, at which Wyant bought, and it was the basis of his purchase.

This sale was approved and confirmed by the court by its decree of April 27, 1883, (R. p. 43), to which decree *Halstead* was also a party, as already shown.

It is thus seen, that the whole fabric of the complainant's bills and briefs are reared upon a false assumption. There is nothing in any deed, paper or record that even suggests or permits the suggestion, that the Forest Hill Co. ever acquired an "undivided half," or any other "undivided" interest, in the Huddleston tract.

SECOND ERROR.

The complainant's second assumption, in his bills and briefs, is, that he and the company have held possession of the Huddleston tract, *out side* of the 105 acres laid off to them by Robson, in 1859.

The complainant's allegation of such possession is destinctly denied by the answers of both Grinnan and Wyant, and no replication was ever filed to either answer—hence the denials are indisputable. See Eq. Rule 66.

But even if replication had been filed, these answers were *evidence*, and could only be overthrown by at least two creditable witnesses. 2 *Story's Eq. Jur.* § 1528–1529.

No such proof was offered, but on the contrary, Robson says emphatically, that both *Halstead* and the *Company*, limited their possession to the 105 acres run off to them by him, R. p. 142, ans. 16; and that *Grinnan*, held sole possession of the residue; ans. 17 and 18. So says *Grinnan*, p. 137, and *Wyant*, p. 171. So also, says *Hale*, the complainant's witness and tenant, upon direct examination, p. 128 ans. 8; p. 129, ans. 25:

i. e. "Were not said improvements confined *exclusively* to western side of this division line drawn by Robson as shown by Ex. B with this deposition?"
Ans., "Yes."
"Were not a part of the fences around the enclosures built on and along said division line?"
Ans., "I believe they were in part."

It is true that in his second deposition, *Hale* claims that Jarrett was his tenant, but in ans. 27, he swears that Jarrett did not live on the land in controversy, *i. e.*, east of *Robson's* line, and Robson shows that he was there as tennant for *Grinnan*.

The complainant, while wholly failing to prove a possession, which did not exist, on the eastern side of Robson's line, next sought shelter under an ambiguous phrase which, while strictly true, is grossly misleading; both he and *Hale* repeatedly use the expression that they held and claimed "according to their deed."

As already shown, the deed to *Halstead* from *Souter, trustee*, granted the 100 acres *as ascertained and located by Robson*, and while this was doubtless the intent and meaning of these witnesses in making these answers it is equally plain that they meant that a different idea should be impressed upon the reader. The frequency and uniformity of this expression in the plaintiff's pleadings, proofs and briefs is strongly suggestive. p. 104 ans. 29, p. 113 ans. 6.

THIRD ERROR.

The plaintiff charges in his bills and briefs some intangible "fraud" on the part of Grinnan and Wyant

The charge itself is too vague for answer or consideration, and is distinctly denied by the answers.

The sum total of the complainant's *proof* is found in answer 45, R. p. 126, by witness *Hale.*

Ques. 45. "Can it be accounted for on any other theory except fraud upon the company?"

Ans. "In no other way that I can see, I believe it was intentional fraud."

Vigel v. *Hopp*, 14 Otto 441.

Every suggestion of fraud or mistake is overwhelmingly refuted by the defendants' evidence, as well as that of the plaintiff. See dep. of *Robson*, *Grinnan*, *Tucker*, *Anstead*, *Harris* and *Wyant*, as well as the deposition of *Hale* himself.

The truth of th case as developed by the evidence is, that the outlet of the 2,000 acres was over the *Elk Ridge tract* and rights of way were expressly provided for through that tract, down Armstrong's creek; that access to the 2,000 acres over the *Huddleston* tract was impracticable because of its rough and mountainous character; that the Forest Hill Co. desired as much *river front* for its oil factories and buildings as possible, and directed the surveyor, Robson, to *widen* the *front* on the *river* at the expense of narrowing the rear of the tract, hence the "paddle shape" given the tract; see dep. of Robson. That the survey was made at the instance of the *company*, in order that they might locate their buildings. See dep. of *Hale*, *Halstead* and *Eames*. That neither *Grinnan* nor *Smith* were *present*, but *Hale*, president of the company, and *Eames*, its superintendent, were; see survey, and letter of McKinney, R. p. 24, Ex. B and C. The lands in controversy, *i. e.*, the back part of the 100 acres, were worth but little then, see Halstead dep. p. 114, ans. 20; and even as late as 1880 were valued by him at only $100; see p. 116, ans. 23. They have since become worth more than $5,000; see his affidavit, p.

208, because of the developments made by Wyant, and improvements placed on them by him of over $7,000 value, see p. 171; hence this suit, and this effort to repudiate the survey made at their instance for their own purposes and by them acquiesced in and acted upon since 1859.

A stronger case for the application of the doctrine of *laches acquiesence* and *estoppel* can hardly be conceived. The uncertain memory of the complainant and his witnesses after such great lapse of time is alone full proof of the wisdom of the rule, and especially where as in this case the rights and property of an innocent purchaser for large value is in jeopardy. Wyant bought the property for $9,324.56, and before the payment of the purchase money (second day after the sale) went on the property, discussed the sale with *Hale* without an intimation from the latter of any question or controversy, and was permitted to pay two-thirds of the purchase money and to expend $7,000 in the development of the land in sight of Hale's house, before the slightest notice or knowledge of any such question or controversy. See R., p. 171, also Hale's dep., p. 163, ans. 17.

Thus without regard to the question as whether there was a *mistake* made in 1859, we confidently submit that the complainant's case can not be maintained, and that the honorable judge who fully investigated the proofs, rightly dismissed the bill.

But we further submit that there was *no* mistake made by Robson in running the division line of 1859.

The foundation of the charge, of "mistake" and "fraud" in the survey of 1859, is the slight departure of the survey as run and marked, from the provision of the deed to the Company, to the effect that the 100 acres should be surveyed off the western side of the tract by a line running from the northerly to the southerly side of said tract "to be bounded on the south by the tract herein above conveyed, (the 2,000 acre tract) and on the north by the Great Kanawha River;" by inspection of the Saulsbury Map, (p. 134), the only map

extant at the time of the deed, it will be seen that as the Huddleston tract is there laid down, it was entirely feasable to so run the division line; but by inspection of the *Robson* map, (p. 149), it will be seen that the Huddleston tract was wrongly located on the Saulsbury map, which was the basis of the deed, and that in fact the 200 acres did not bind *at all* on the 2,000 acres on the *south*, and it was impossible to comply with this call in the deed; being an impossible call, it was necessarily rejected, and the tract at the direction and with the assent of both parties was divided in accordance with the remaining calls, viz: from north to south. It may be suggested that the deed contemplated that the division should be made by a *straight* line, but the proofs are that the Company demanded a *broad front on the river*, at the expense of the width on the rear, wherefore the broken line for the division. See *Robson's* Dep.; also *Hale's*, wherein he shows, that the company occupied the front with its buildings and fences *up to* the line as located by *Robson*. Robson testifies that the plat, showing the broken line and the necessity for it, was shown to the Company's representatives before marking the line on the ground, and was approved, and agreed to by them, and ever afterwards acted upon and recognized, both by the Company and *Halstead:* The evidence of these facts is so fully discussed in the brief of counsel for Dr. Grinnan, that its repetition here is deemed unnecessary; but we especially ask, that the deed to the Company be read in connection with the Saulsbury map and Robson's map, and the surveys of 1859, and 1861, also Robson's deposition.

FOURTH ERROR.

Complainant's counsel, throughout his brief, assumes that it was the *duty* of *Grinnan* and *Smith* to lay off the 100 acres.

While immaterial, the assumption is not true; the deed prescribes no such duty, but contemplates the joint action

of the parties, or rather of either, if the other declined to join.

It is true that witness Hale repeatedly asserts that it was the "agreement," that Smith and Grinnan should lay off this land, but when cross-examined, his testimony upon this subject, as upon many others, proves to be wholly incompetent.

R. p. 165, Ans. 2, he says:

"I had no personal knowledge of the transaction until after the purchase."

When asked as to the alleged agreement of Smith and Grinnan, to lay off the 100 acres; he answers, R. p. 165, ans. 3:

"It was a personal agreement in the first place, betweeen Smith and Grinnan, and the man who was negotiating; the deed conveys 100 acres, more or less, off the westerly side."

Ques. 4. "From whom did you learn of this personal agreement, and when was it made?"

Ans. "I learned it from Cowan. It was just about the time the purchase was made."

R. p. 131.

Ques. 46. "Did any one else than Cowan act for the Company or represent it in the purchase of this property?"

Ans. "Not that I know of."

Ans. 49. "As for myself I had little or nothing to do with the purchase."

Cowan was a member of the Forest Hill Company, and alone conducted, in its behalf, the negotiation for the purchase.

The worthlessness of this testimony as to the "personal agreement" is apparent, and needs no discussion, but if proven were immaterial in view of the deed; and were it so provided in the deed, it would still be immaterial, as it is shown, that the survey was immediately made under the joint direction of the agents of Grinnan and the Company,

at Grinnan's expense, and plats furnished both, and the division accepted by both.

FIFTH ERROR.

Complainant's counsel assumes that Mr. J. M. McKinney was agent for Smith and Grinnan alone, and was sent by *them* to lay off the land. This is also immaterial, but nevertheless an error. Mr. McKinney was a New York lawyer, nephew of Judge Cowan, one of the Company and its representative in the purchase, and was agreed upon by the parties, vendors and vendees, to represent them in laying off the land, R. p. 136. Hale infers he was the agent of Smith and Grinnan, because as Commissioner of Deeds he took their acknowledgement to the deed to the Company. An inspection of the trust deed from the *Company* to *Robt. Soutter*, trustee, shows that *McKinney* also took the acknowledgement of the *Compauy* to that deed. If there be anything in Mr. Hale's inference, then Dr. Grinnan's statement is confirmed, wherein he says, that *McKinney* repreented *both* parties on the survey.

The statement that Robson, was at that time, agent for Grinnan, is incorrect. *Robson* states, (R. p. 145, ans. 3.) that he became agent for Grinnan in 1867 or 1868, and continued such until the land was sold to Wyant in 1883.

SIXTH ERROR.

Complainant's counsel, with equal confidence, assumes that the plat and survey mentioned to his petition for rehearing and affidavit, is the original plat and survey. The court below summarily disposed of this claim and dismissed the petition. The map, he so represents as the original, is endorsed upon the face "*a copy*," and the survey accompanying it, has the memo. "Fee 50 cents," the amount the law there allowed to the county surveyor, for such copy. The date "Oct. 14, 1859," appended is the date of the *copy*, not of the *survey*, (R. p. 134–5), the survey having been made

prior to August 9, 1859, as shown by Mr. McKinney's letter. (R. p. 24.)

Hale, the brother-in-law, agent, tenant and willing witness of the complainant, relied greatly upon the date upon this copy to sustain him in his assertion of absence at the date of survey because he says he *knows* he went east in *September* and did not return until December—thus this staff for his memory becomes a broken reed.

Despite the frantic efforts of *Halstead* and *Hale* to escape the force of the deeds, maps and surveys filed, and the contemporaneous letter of J. W. McKinney, they have themselves proved enough to fully sustain the defendant's case, while the defendants' proofs overwhelm them. Upon each of the several grounds of defence here presented we rely with utmost confidence and respectfully ask an affirmance of the decree of the U. S. Circuit Court.

BROWN, JACKSON & KNIGHT,
for Deft. Wyant.

J. F. Brown

W. McClellan
for appellee.

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128

IN THE

Supreme Court of the United States.

In Chancery.

JOHN HALSTEAD, APPELLANT,

against

A. G. GRINNAN AND OTHERS, APPELLEES.

EPPA HUNTON,
Counsel for F. B. Chewning's Estate and A. H. Smith.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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Supreme Court of the United States.

In Chancery.

JOHN HALSTEAD, APPELLANT,

against

A. G. GRINNAN AND OTHERS, APPELLEES.

As attorney for John F. Crissman, executor of F. B. Chewning, I submit the following brief:

This case was heard upon its merits before the district court of the United States for the district of West Virginia, at Charleston, on the 26th of May, 1888, when the court made its decree as follows:

These causes—John Halstead against William Wyant and others, in equity; A. G. Grinnan against S. C. Long and others, in equity; F. B. Chewning against J. L. Cowan and others, in equity—this day came on to be heard together and were argued by counsel; whereupon, upon consideration hereof, it is adjudged, ordered, and decreed that the amended and supplemental bill in the first-mentioned cause be, and the same is hereby, dismissed, and that the defendants recover of the said John Halstead their costs about their defence in that behalf expended. From this decree John Halstead appealed to this Court.

From the facts disclosed in the record it will appear that

on the 15th day of June, 1859, William K. Smith and wife, A. G. Grinnan, George B. Grinnan, and A. G. Grinnan, trustee, were possessed in fee simple of a tract of land known as the "Forest Hill tract," containing two thousand acres of land, and also of a tract of land called the "Huddleston tract," containing over two hundred acres; that said tract of two hundred acres bordered on the Kanawha river; that on the said 15th day of June, 1859, the said William K. Smith and wife, A. G. Grinnan, George B. Grinnan, and A. G. Grinnan, trustee, conveyed to the Forest Hill Mining and Manufacturing Company the said Forest Hill tract, and also "certain piece or parcel of a certain tract of land known as the 'Huddleston tract,' to be surveyed off the western side of said tract by a line running northerly to the southern side of said tract, to be bounded on the south by the tract hereinbefore conveyed and on the north by the Great Kanawha river, and containing one hundred acres more or less." Attention is here called to the fact that the grantors in this last-mentioned deed owned the whole of the Huddleston tract, the two undivided halves of said tract having been conveyed by previous deeds to the grantors in this deed, and that the one hundred acres conveyed to the Forest Hill Mining and Manufacturing Company was not described, or intended to be, an undivided half of the Huddleston tract, but expressly states that it conveys one hundred acres of the said Huddleston tract, to be surveyed off of the western side of the said tract, etc. This sale was made by Grinnan, as trustee, under a deed of trust from W. K. Smith, conveying this property to secure the debts of W. K. Smith. The other grantors united in the deed to the Forest Hill Company to make the title complete.

On the first Monday in November, 1878, A. G. Grinnan, in his own right and as trustee under the deeds executed by William K. Smith, filed his bill of complaint in the circuit court of Fayette county, West Virginia. The object of this suit was to settle up his trust under the said deed from

William K. Smith and wife, to sell the residue of the property, and to pay the debts according to the trust deed aforesaid.

On the first Monday in ——, 1871, F. B. Chewning filed his bill of complaint against J. F. Cowan and others, praying for a settlement of the account of A. G. Grinnan as trustee of William K. Smith.

Under proceedings in the two last-mentioned suits in the State courts of West Virginia for Fayette county the account of A. G. Grinnan was settled and the debts secured ascertained by a report of the commissioner. These debts consisted of three classes. Those in the first and second classes were discharged in full. The third class consisted mainly of a large debt due to F. B. Chewning and another to Abigail H. Smith, as will appear by copy of Commissioner Preston's report, pages 257 and 259 of the record. The only property left to pay the debts due Chewning and Smith was the residue of the Huddleston tract and another small one.

On the first day of November, 1881, in the suits of Grinnan against Long and others and Chewning against Cowan and others a decree was entered directing John W. Harris, as special commissioner, to sell at public auction or private sale the remaining trust properties. John W. Harris, as commissioner aforesaid, proceeded to sell the land in the decree above mentioned, and reported that he had sold to William Wyant for the price of nine thousand three hundred and twenty-four dollars and fifty-six cents ($9,324.56).

John Halstead is made a party to the suits in the State court by publication, and afterwards appeared and, under the statute, filed his petition for a rehearing.

On January 24, 1888, John Halstead filed his suit in chancery in the United States circuit court for West Virginia, in which he asked that the portion of the Huddleston tract conveyed to the Forest Hill Company should be laid off to him in a manner different from the division under

which the purchase was made by Wyant, so that the matter in dispute is the division of the Huddleston tract. To the sale of this tract Chewning and Smith have to look for the payment of their debts. They are, therefore, interested in the confirmation of the sale to Wyant.

It will appear from the record that Commissioner J. W. Harris sold the residue of the Huddleston tract according to a survey made for him by the county surveyor of Fayette county. The question before the court on the appeal of John Halstead is whether he has any right to such a division of the Huddleston lands as he claims.

On the 15th of January, 1859, the Forest Hill Company conveyed the land (which had just been conveyed to it as aforesaid) to Soutter in trust to secure the purchase-money due from it (see Record, page 11). That part describing the Huddleston land uses the same words of description as found in the deed to the company.

After the execution of this deed the company became the owner in severalty of the 100 acres of the Huddleston tract to be laid off to said company. The terms of this deed furnish no ground for the claim of an undivided half interest in the Huddleston tract.

In August, 1859, as claimed by appellees, or in October, 1859, as claimed by appellant, that portion of the Huddleston tract conveyed to the company was surveyed by T. S. Robson, then county surveyor, and a plat was made and furnished to each party. The corners and lines were carefully marked and could be readily seen and followed afterwards.

The Forest Hill Company took possession of the parts so surveyed to it and built up to the dividing line. This is proved by the responsive answers of defendants and by the deposition of T. S. Robson found on pages 140 to 148.

The plat of this survey and division accompanies his deposition and is marked T. S. R. No. 1, page 148.

In this deposition he proves that Grinnan took possession

of the eastern portion and the company of the western by the lines he ran in 1859, and so held without complaint or objection till a few years before—that is, till about the time this suit was brought by Halstead. In February, 1861, less than two years after the survey aforesaid, and at the request of the Forest Hill Company, T. R. Robson, surveyor of Fayette county, surveyed the whole estate of the company, embracing the Forest Hill tract and the 100 acres of Huddleston tract as run off by Robson in 1859. (See answer 11, page 141.)

These plats were furnished to the Forest Hill Company, and last-named map was hung in its office to show the members and others the property of the company.

It will be seen by this map, T. S. R. No. 2, page 148, that no part of the Forest Hill tract lies north of the Huddleston tract, and therefore the call for the Forest Hill tract as a northern boundary was a mistake. Indeed, when that portion is taken from the Forest Hill tract that Buster recovered, the two tracts only touch at corner 4 on map No. 2. The line of the Forest Hill tract to the corner of the Huddleston tract at corner 4 runs on top of the mountain, and this fact shows that an outlet to that tract through the Huddleston tract was not valuable, and furnished a reason for the right of way conveyed in the deed of June 15, 1859, over the Elk Ridge tract to Armstrong creek (page 7).

In this condition of affairs in 1864 the land owned by the Forest Hill Company was sold under the deed of trust to Soutter to secure the purchase-money, and John Halstead became the purchaser for a nominal price. Attention is called to the terms of the deed, Soutter, trustee, to Halstead (pages 13 to 15). In the granting clause on page 15 the language as to the portion of the Huddleston tract is as follows:

"Also a lot, piece, or parcel of land, containing one hundred acres, more or less, provided in said deed to be surveyed off the west side of the tract of land known as the

'Huddleston tract,' *as the same was ascertained and bounded by the survey made subsequently to the execution of said deed,* adjoining the above."

The conveyance of this piece is "as ascertained by a survey made since the deed to the Forest Hill Company." What survey is meant? There were only two—Nos. 1 and 2—with Robson's deposition, and both give the metes and bounds as claimed by the defendants. The complainant took by this survey and can claim no more than this survey gives him. This survey is right; but if wrong the appellant has no ground to complain. He bought by it and got nothing but the lands embraced in it.

From the time of this purchase in 1864 to the institution of this suit appellant took and held possession according to his deed and the survey of Robson.

Indeed the Forest Hill Company took possession immediately after the survey by Robson in 1859 (see the depositions of Charles F. Hale, the president of the company, page 133, answers Nos. 2 and 3). He admits the line was marked by post and by marked trees, and thinks he had with him Robson's survey, "marked Exhibit B," when he took possession (see also the depositions of H. I. Tucker, county surveyor in 1882). He says in answer to 4th question, page 175, that he surveyed the 100 acres by the Robson survey and found the lines well marked.

The beginning corner on the river was shown by Dr. Hale, who was president of the company when the survey was made by Robson in 1859. The continued possession of both parties from the time of survey in 1859 till the institution of this suit is further shown by the testimony of Robson, who was agent for Grinnan, found on pages 142 and 143.

Charles F. Hale, who was president of the company from its organization in 1859 until the sale of its property to Halstead in 1864, says in his deposition (page 124, answer to

34th question) that he was furnished with Robson's survey No. 1 in 1859; that he did not know till 1861 when the whole map (Robson's No. 2) was made, that the two tracts did not adjoin, but does not say he made any complaint or changed his possession or took any steps to correct the survey. (Page 27, answer to question 20.)

It will be seen that Wyant bought from Harris, commissioner, under a decree in suits to which John Halstead was a party, and by a survey made by said commissioner.

This statement of the facts is an unanswerable argument against the claim of appellant to have a resurvey of the land he purchased of Soutter, trustee.

It is apparent from the evidence that the part of the Huddleston tract purchased by the company was then mainly valuable for its river front on which it could locate its buildings. The balance of the piece was very mountainous. In the division made by Robson this frontage was increased so as to give the company as much as was retained by Grinnan, although Grinnan, owning the larger portion of this tract and another small tract on the river, was entitled to more than half the river frontage. But Robson says in his deposition, page 140, he was "required to divide the front line on the river equally." This could not have been done unless both sides were represented. It is fair, therefore, to state that both parties attended this survey of Robson, and, if so, the failure of the company to object is binding on it and on its assignees. But no objection was made until this suit was brought, and we must conclude that during all that time the parties were satisfied because they had all they had bought and as they purchased it. They had no right to object because they knew at least a part of the lines of Robson's survey. Chas. F. Hale, the president of the company, says some of the lines of Robson's survey and part of the division line is well marked; that he has been over part of these lines. (See his deposition, page 128—14, 15, 16, 17, and 18 answers.)

It is submitted that when he says he knew some of these lines which were well marked and took possession by them he is estopped from saying he did not know how the 100 acres were cut off.

Particular attention is callled to map marked T. S. R., No. 2, page 148, which Hale, the president of the company, says was made for the company and hung up in their office. This shows all the lands of the company and their connections.

It will be seen that Buster had recovered of the Forest Hill tract 95 acres, and this carried his line south to 4 and 5 on a line which strikes the extreme southern boundary line of the Huddleston tract and prevents any junction of these two tracts, except at corner 4 on the top of the mountain, so that a union with the Forest Hill tract at the south end of the Huddleston tract was impossible. But consider, if you please, the 95 acres recovered by Buster as a part of Forest hill, then it is apparent that there was no connection between the two tracts on the south. The Forest Hill tract would be on the east and not on the north. The Huddleston tract borders on the Paint Creek Company's tract on the entire north side, leaving Forest hill on the east side of Huddleston tract.

It is plain, therefore, that when the 100 acres were allotted or run off no southern boundary on the Forest hill could be given. The call in the deed was for 100 acres from the west side of Huddleston tract and down to the river. It is submitted that the survey of the 100 acres made by Robson was the only one that could be made without diminishing the river front of the 100 acres, and no matter how made could not run the dividing line so as to give a connection with Forest hill.

If the court was called on to make the allotment of this 100 acres as an original proposition it could be made in no other way without greatly diminishing the river frontage, its most valuable part.

Counsel for appellant in his supplemental brief undertakes to show how the Halstead portion of the Huddleston tract could have been cut off and make the Forest Hill tract its southern boundary. (See his map No. 3 with this brief.)

To make this division he first takes the untenable ground that Halstead was entitled to one-half of the Huddleston tract. This cannot be because the deed to the Forest Hill Company conveys 100 acres of the whole tract containing 259 acres, and under no circumstances could Halstead get more than 100 acres in any fair and proper division or allotment. But Halstead's deed from Soutter expressly recites the 100 acres have been allotted, and of course by Robson's survey. Halstead must stand by this survey because he purchased by it and cannot claim outside of it. Again counsel in this plat which he claims would be a fair division makes the southern part of the Huddleston tract a part of the Forest Hill tract and claims a southern boundary on Forest hill. It will be seen by his map No. 2 in his said brief that the Huddleston tract runs alongside of Forest hill, with its southern abutment on another tract—the Painter's Creek Company's tract, and leaves Forest hill on the east side, and making a part of its eastern boundary. Take Buster's recovery from Forest hill, and then it does not furnish any part of the boundary for this tract, but only touches it at one angle. No court could order or sanction such a division. Halstead, who purchased in 1864, knew exactly how the 100 acres had been cut off and its boundaries. In 1880 he negotiated with Grinnan for the purchase of the southern portion of his part of the Huddleston tract south of the Wilson line. (See map marked T. S. R. No. 2, with Robson's depositions, page 148.)

This negotiation is evidenced by two letters of Halstead to Grinnan, one of which will be found on page 116 and referred to in Halstead's deposition, and the other on page 139. The offer to purchase this land demonstrates the ab-

sence of any claim of right thereto, and shows he very well knew the boundaries of the land as purchased by him from Soutter.

Hale, the president of the company, in his answer to 33d question, page 124, admits he knew the two tracts did not adjoin, and this was shown by the Robson survey of 1861, No. 2.

This admission that the company knew in 1861 that the two tracts did not adjoin is fatal to the claim of Halstead, because after this, in 1864, the company's trustee, Soutter, conveyed to Halstead this land as designated by the very survey which showed the company the two tracts did not unite.

These facts are not weakened because of the description of the interest of Grinnan in the Huddleston tract contained in the bills filed by complainant in the suits of Grinnan *vs.* Long and Chewning *vs.* Cowan. In these cases this interest is described as an undivided half; also in the decree of sale. But these bills were filed by counsel and were not signed by the complainant, indeed not even by counsel. When the court made its decree it followed these unauthorized recitals in the bill, but when the commissioner appointed to sell undertakes to find the land he is ordered to sell he sees that the 100 acres which were owned by Halstead had been surveyed to him; that Halstead's deed gave him no more, and proceeded to survey and sell the residue, which amounted to about 157 acres. He returned with his report of sale the survey made by the county surveyor, and, with the full knowledge acquired by this report and survey, the court confirmed the report of sale.

By this decree the court decided that the land sold was all the residue of the Huddleston tract after taking from it the 105 acres which had been surveyed to Halstead by Robson.

Counsel for appellant in his brief (page 30) maintains that the deed of Soutter does convey to Halstead all the right of

Soutter and Grinnan in the Huddleston tract, and quotes from the deed as follows: "Which said lands and right of way are more fully described in a deed from W. K. Smith and A. G. Grinnan to said Forest Hill M. & M. Co., &c., together with all the right, title, and interest to which the said party as trustee ever had in the lands and tenements, &c."

If, instead of adding the "&c.," the counsel had quoted a little more, it will appear clearly that the trustee was not conveying by the description in the deed to him, but by the description which he had just made of that part of the Huddleston land which he meant to convey.

This deed from Soutter to Halstead on page 15 conveys this Huddleston tract "as the same was ascertained and bounded by the survey made subsequently to the execution of said deed and in pursuance thereof." He conveys by this survey (Robson's) made in pursuance of the deed of Soutter and Grinnan to the company and of the deed of the company to Soutter. He not only conveys by this survey, but expressly declares it was made in pursuance of the deeds he claimed under. This declaration of his vendor bound for all time the vendee, Halstead. Nor is this description of the land varied by that portion quoted by the counsel for appellant above stated, if you will extend the quotation and add the words "last described." Now, the meaning of these words is perfectly clear. The grantor had conveyed that part of the Huddleston tract as the same was ascertained and bounded by Robson's survey. He had in the foregoing part of the paragraph conveyed this land by Robson's survey, and was the last described, and then added, what is usual with many conveyances, "all the right, title, and interest which the said party of the first part as trustee named in said deed ever had or has in the lands and tenements *last described.*" That is, all the interest in the Huddleston tract as described

by Robson's survey. It is merely a special warranty or quit-claim deed.

This position is strengthened by the fact that Halstead was one of the company that purchased this land, and soon became the owner by purchase of all the bonds of any value that were secured in the deed of trust to Soutter. He was therefore bound to know of this survey of Robson's, and was bound by it whether he ever traced its lines or not.

In conclusion, it is maintained with confidence that—

1st. These 105 acres were correctly laid out according to the description in the deeds; that no other mode could have been adopted without making a new contract between the parties.

2d. That if not correctly laid off it was ratified and accepted by both parties. They both took possession according to Robson's survey in 1859. Both parties knew at least a part of the lines and held possession by them. It was the duty of each party to trace the balance of these lines, and failure to do so was accepting Robson's survey on trust and agreeing to abide by its metes and bounds. But Halstead did know, certainly as early as 1861, when the Robson map No. 2 was hung in the company's office, that the 100 acres was set apart just as it was and is now claimed by appellees. Halstead was at this time the owner of all the bonds that could be reached by a sale of the land, and was practically the owner of the 105 acres. It will not do to say he was not bound by Robson's survey even if not entirely correct, because he acquiesced in this survey, was in possession under it from 1859 to 1885, a period of twenty-six years.

3d. If the company under its deed from Smith and Grinnan was entitled to an undivided half of the 259 acres, only 105 acres by Robson's survey was conveyed to Halstead. He can claim no more.

4th. If Halstead ever had any right to the land he now claims he has lost it by laches, and a court of chancery will not disturb rights that have been acquiesced in for twenty-six years.

The doctrine of laches is too well defined to allow this.

5th. The statute of limitation would bar any action at law to recover this property. Equity follows the law. It is admitted that Grinnan and Wyant have been in possession up to the Robson dividing line that runs down perpendicularly to the river; that this line was only one of a survey of the whole tract, and Halstead knew there was a line or lines completely separating the two parts. The possession of these lines is possession by all unless there is proof of notorious adverse possession. There is no such proof; Grinnan and Wyant have been in open possession they now claim for twenty-six years and have thus acquired a good and indefeasible title to the land purchased by Wyant as laid off by Robson, granting, for the sake of the argument, it was not originally laid off, in conformity to the deed, to Grinnan and Smith.

The decision of this case depends upon the facts proved. They raise no question of law which requires authorities to decide. For this reason citation of authorities has been deemed unnecessary. If Halstead only acquired by his deed the 105 acres, according to Robson's survey, no authority is necessary to convince the Court that he must be content with the 105 acres so surveyed. If he was by his deed in 1864 entitled to a different division and as one of the company and the beneficial owner of the tract he was bound to know in 1859, certainly in 1861, that the land was allotted by and according to Robson's survey, and having acquiesced in such allotment and possession under it no authority is necessary to show that he cannot in 1885 disturb the rights of Wyant, who became shortly before a *bona fide* in-

nocent purchaser of the land by Robson's survey without any notice of this claim by Halstead, especially as the purchase was made under a decree in the suit to which Halstead was a party.

It is respectfully submitted that the decree should be affirmed.

EPPA HUNTON,
Counsel for F. B. Chewning's Estate and A. H. Smith.

Transcripts

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